SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 467.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

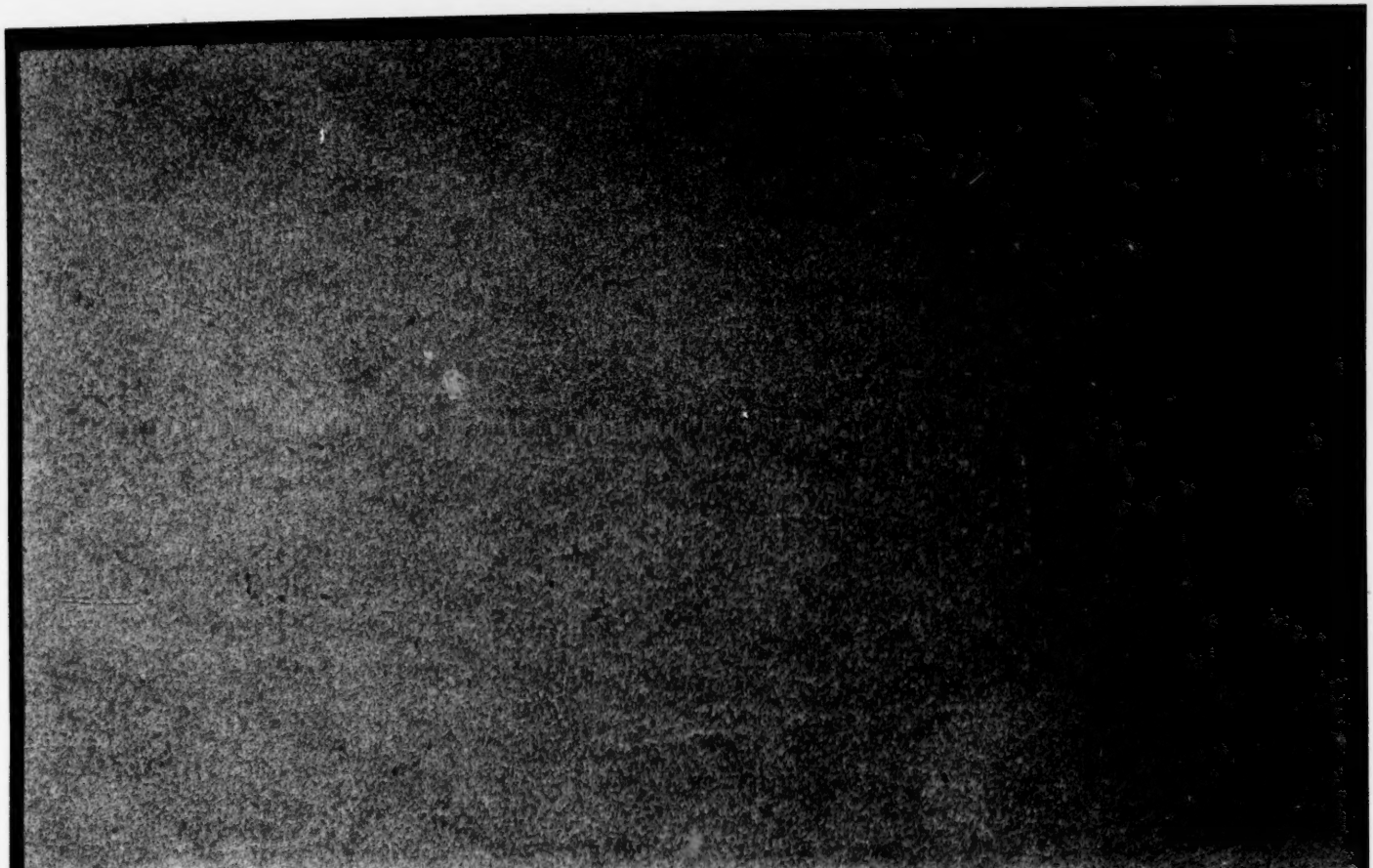
vs.

THOMAS TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 10, 1907.

(16,876.)



(18,579.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 351.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS TENNESSEE.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the December term, 1901, of said court, begun and held at the United States court-house in the city of St. Louis, Missouri, on the first Monday in December, to wit: the second day of December, A. D. 1901, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twenty-fifth day of July, A. D. 1901, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the eastern district of Arkansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Thomas Tennessee was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the April Term, 1901, thereof, between Thomas Tennessee, plaintiff, and The Choctaw, Oklahoma & Gulf Railroad Company is defendant, a manifest error hath happened, to the great damage of the said Choctaw, Oklahoma & Gulf Railroad Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, on or before the third day of August, 1901, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of June in the year of our Lord one thousand eight hundred and ninety-one. Issued at office in the City of Little Rock, with the seal of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, dated as aforesaid.

The Seal of the Circuit Court U. S. A., Western Division, of East. Dist. Ark.

W. P. FEILD.

Clerk Circuit Court United States, Western Division of the Eastern District of Arkansas.

Allowed by
JACOB TRIEBER,
U. S. District Judge.

Service of this writ acknowledged this 4th day of June, 1901.
BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Attys. for Plff. Thos. Tennessee.

Indorsed: Filed June 4, 1901, W. P. Feild, Clerk.

Return to Writ.

United States of America,
Western Division of the
Eastern District of Arkansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

The Seal of the Circuit Court U. S. A., Western Division, of East. Dist. Ark.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Little Rock, this second day of July, A. D. 1901.

W. P. FEILD,
Clerk of said Court.

2 Be it remembered, that on the 29th day of March, 1901, came into the office of the Clerk of the Circuit Court of the U. S. for the Western Division of the Eastern District of Arkansas the Choctaw, Oklahoma and Gulf Railroad Company, by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and filed therein its transcript [—] proceedings on removal from the Pulaski Circuit Court, Second Division, of Arkansas, in case of Thomas Tennessee vs. the Choctaw, Oklahoma and Gulf Railroad Company, which transcript of proceedings is in the words and figures following:

State of Arkansas,
County of Pulaski—ss.

Be it remembered that at a term of the Circuit Court for the second division of said county, begun and held at the court-house in the City of Little Rock, County and State aforesaid, on Monday, the 24th day of September, A. D. 1900, the same being the time and place prescribed by law for holding said Court, present and presiding the Hon. Joseph W. Martin, Judge of said Court, and Horace G. Dale, Clerk of said Court, and W. M. Kavanaugh, Sheriff of said County, being also present, Court was proclaimed in due form of law by said Sheriff when the following proceedings were had, to wit:

In the Pulaski Circuit Court, Second Division.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Complaint at Law.

3 Comes the plaintiff, Thomas Tennessee, by Blackwood & Williams, his attorneys, and for cause of action alleges:

That the Choctaw, Oklahoma and Gulf Railroad Company is a corporation duly incorporated under an Act of Congress of the U. S., with a line of railroad running from near Memphis, Tenn., southwesterly through the State of Arkansas, and through the town of Argenta, Arkansas.

That on the 6th day of February, 1900, the plaintiff was engaged as a brakeman on the freight train of the defendant, and was engaged in his duty as such in the town of Argenta, Arkansas, and as such was riding on the front end of the engine of freight train numbered thirteen (13), headed into the yards of said railroad.

That at the place where plaintiff was then engaged in the performance of his duty, there was a step on what is known as the "cow catcher" where plaintiff in the performance of his duty was accustomed to step. That in the performance of such duty he placed his foot upon said step, and the said step by reason of being in a weak or unstable condition gave way and thereby precipitated him on to the ground where he became entangled in the ties of said railroad company, and the said train ran over his left leg and bruised and mangled the same so that he was compelled to have it amputated near the body.

That the defendant was negligent in the construction of said step, and was negligent in permitting it to stay in a faulty and unfirm condition. That the condition of said step was unknown to this plaintiff.

That said railroad was operating said train over a track where the ties stood up some fifteen inches from the ground and thus made a man-trap into which plaintiff was thrown. That if said ties had been properly filled in when plaintiff fell onto the track of same he might have escaped uninjured, but by reason of the negligent construction of said track, plaintiff was caught in between the same and thereby suffered the loss

of his leg as aforesaid. That plaintiff was just beginning to run into the new yard and upon the new track, and its
4 dangerous condition was unknown to plaintiff.

That by reason of the negligence of the defendant, plaintiff suffered great bodily suffering, and severe mental anguish, and lost the use of his limb, to his damage in the sum of five thousand dollars ($5,000.00).

Wherefore, plaintiff prays judgment for $5,000, and for his costs.

BLACKWOOD & WILLIAMS,
Attys. for Pltff.

Filed and writ issued Aug. 14th, 1900.
H. G. DALE, Clerk.

Summons—Action by Ordinary Proceeding.

State of Arkansas,
County of Pulaski—ss.

The State of Arkansas to the Sheriff of Pulaski County:
You are commanded to summon Choctaw and Memphis Railroad Company to answer, within twenty days from the service of this writ, upon it, a complaint filed against it in the Circuit Court of said County by Thomas Tennessee, and warn it that upon its failure to answer, the complaint will be taken for confessed. And you will make due returns of this Summons within twenty days from the service hereof.

Witness my hand and the seal of said Court, this 14th day of Aug., 1900.
[Seal] H. G. DALE, Clerk.

State of Arkansas, County of Pulaski, ss. I have this 18th day of August, 1900, duly served the within by delivering a copy of the same to W. B. Smith, secretary of the within named Choctaw & Memphis R. R. Co. in said County as therein commanded, Service 50, Mileage 10, Return 60. W. M. Kavanaugh, Sheriff, Eugene Jabine, Deputy Sheriff. Returned and filed this 6th Sept. 1900. H. G. Dale, clerk. Blackwood & Williams, Attorneys.

On October 12th, 1900, a day of said Court, the following proceedings were had:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes said defendant by its attorney, Thomas Buz-
5 bee, and by leave of Court files herein its petition and bond for the removal of this cause to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

In the Pulaski Circuit Court.

Thomas Tennessee, Plaintiff,

vs.

Choctow, Oklahoma & Gulf Railroad Company, Defendant.

Petition for Removal.

To the Honorable Joseph W. Martin, Judge of the Circuit Court of Pulaski County, Arkansas:

Your petitioner respectfully shows that it is the defendant in the above-entitled suit, and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

That your petitioner was, at the time of the bringing of this suit, and still is, a corporation organized under an act of congress of the United tSates, entitled "An Act to authorize the purchase of the property and franchises of the Choctaw Coal and Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company," which was approved August 24th, 1894, and that the plaintiff was then, and still is, a citizen of the State of Arkansas.

That said suit is of a civil nature, the same being an action at law by the plaintiff to recover against this defendant for injuries alleged to have been caused to plaintiff by the negligence of the defendant in operating a railroad alleged to have been owned by it.

That the said suit is one arising under the laws of the United States in this, to-wit: That this defendant is a corporation organized and incorporated under the provisions of an act of the congress of the United States, entitled "An act to authorize the purchase of the property and franchises of the
6 Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that Company," which was passed by the Congress of the United States and approved on the 24th day of August, 1894, and under the provisions of which Act of Congress defendant maintains its corporate capacity and carries on business as a railroad company.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said court of the United States for the Western Division of the Eastern District of Arkansas, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to said circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States for the Western Division of the Eastern District of Arkansas, and it will ever pray.

J. W. McLOUD,
E. B. PEIRCE and
THOS. S. BUZBEE,
Attorneys for Petitioner.

Bond for Removal.

Know all Men by These Presents:

That the Choctaw, Oklahoma and Gulf Railroad Company, as principal, and J. J. Mandlebaum as sureties, are held and firmly bound unto Thomas Tennessee in the penal sum of Five Hundred Dollars, for the payment whereof, well and truly to be made unto the said Thomas Tennessee, his successors and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents; yet, upon these conditions:

The said Choctaw, Oklahoma and Gulf Railroad Company, having petitioned the Circuit Court of Pulaski County, Arkansas, for the removal of a certain cause therein pending wherein
Thomas Tennessee is plaintiff and the Choctaw, Okla-
7 homa and Gulf Railroad Company is defendant, to the
Circuit Court of the United States in and for the Western Division of the Eastern District of Arkansas:

Now, if the said Choctaw, Oklahoma and Gulf Railroad Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, in full force and virtue.

Witness our hands and seals, this 12th day of October, 1900.

CHOCTAW, OKLAHOMA and GULF R. R. CO., Principal,
By THOS. S. BUZBEE, Atty.
JAS. J. MANDLEBAUM, Sureties.

Filed Oct. 12th, 1900. H. G. Dale, Clerk. By J. J. McEvoy, D C.

On October 31st, 1900, a day of said Court, the following proceedings were had:

Thomas Tennessee, Plaintiff,
vs.
Choctaw & Memphis Railroad Company, Defendant.

Comes said defendant, by its attorney E. B. Peirce, and the petition and bond of said defendant for the removal of this cause to the United States Court, heretofore filed, now coming on to be heard, and it appearing that said bond is in due form, conditioned as required by law and that the surety thereon is good and sufficient, the same is therefore approved and it is considered and ordered by the Court that the prayer of petitioner be granted and that this cause be removed for trial to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, and the Clerk
8 of this Court is directed to make out and transmit to said Court a true and complete transcript of the record and proceedings of this Court in this cause.

State of Arkansas,
County of Pulaski.

I, J. J. McEvoy, Clerk of the Circuit Court in and for said County, do hereby certify that the above page, and eight (8) preceding pages, contain a true, complete and perfect transcript of the record entries and pleadings in the case of Thomas Tennessee vs. Choctaw and Memphis Railroad Co. as the same now appear of record and on file in my office.

Witness my hand and official seal, this 12th day of December 1900.

[Seal] (Ten cent revenue stamp)

J. J. McEVOY, Clerk.

Fee Bill.

H. G. Dale, Clerk, (Pd. by plf. $2.50)	$3.65
J. J. McEvoy, Clerk, (Transcript)	3.60
W. M. Kavanaugh, Sheriff, (Pd. by plf.)	.60

Transcript filed March 29, 1901. W. P. Feild, Clerk.

9 United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 22nd day of October Anno Domini, One Thousand, Nine Hundred at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber District Judge presiding and holding said Court, the following proceedings were had, to wit: on March 29th 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the defendant by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and files its motion to require plaintiff to strike certain parts of his complaint herein.

Which motion to strike is as follows:

In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.
April Term, 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Motion to Strike.

Comes the defendant, and moves the Court to require plaintiff to strike from his complaint the following sentence: "That soon afterwards said track was properly filled in and said step was taken off and replaced by a good and proper one," and for cause says, that said allegation is irrelevant and immaterial, and not pertinent to the issues in this cause.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant.

Filed March 29th, 1901. W. P. Feild, Clerk.

United States of America, Western Division of the Eastern District of Arkansas.

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the first day of April, Anno Domini, One Thousand Nine Hundred and One at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber District Judge presiding and holding said Court, the following proceedings were had, to wit: on April 4, 1901.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams, Esqs., his attorneys, and the defendant by E. B. Peirce, Esq., its attorney, and the motion of said defendant heretofore filed herein to require plaintiff to strike certain parts from his

complaint is by leave of court withdrawn, and by agreement of parties this cause is set down for trial on Friday, April 12, 1901.

And on April 5, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the defendant by J. W. McLoud and E. B. Peirce, Esqs., its attorneys, and by leave of court files herein its answer.

11 Which answer is in the words and figures following, to wit:

In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.
April Term, 1901.

Thomas Tennesee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Answer of Defendant.

Comes the defendant, the Choctaw, Oklahoma and Gulf Railroad Company, and for answer to the complaint of the plaintiff herein, says:

That it is not true that the Choctaw, Oklahoma and Gulf Railroad Company is a corporation duly organized under the laws of the State of Arkansas, but states the fact to be that it is a corporation organized under an act of the Congress of the United States.

Defendant further answering says, that it is not true that plaintiff was riding on the front end of the engine of freight train No. 13, headed into the yards of said railroad, but alleges the fact to be that plaintiff was attempting to step upon the front end of said engine; and that the act of attempting to ride upon said front of said engine was unnecessary, careless and improper on the part of the said plaintiff; and, in the discharge of his duty, he was not required, nor was it necessary for him to attempt to so ride; and in attempting to do so he was violating the rules of said defendant company.

Defendant further answering, states, that it is true that there was a step on what is known as the "cow catcher", but denies that plaintiff, in the performance of his duty, was accustomed to ride or step thereon.

Defendant denies that plaintiff was in the performance of his duty on the particular occasion referred to in his complaint, in attempting to place his foot upon said step; and denies that said step was in a weak and unstable condition and gave way and thereby precipitated him to the ground,
12 whereby he became entangled in the ties of the said railroad company; and denies that the condition of the step had anything to do with the precipitation of said plaintiff to the ground, which resulted in the injury of which plaintiff complains.

Defendant denies that it was negligent in the construction of said step, and denies that it permitted said step to remain in a faulty and unfirm condition, and denies that it was guilty of any negligence whatever in permitting it to remain in a faulty and unfirm condition.

Defendant denies that the condition of said step was unknown to plaintiff.

Defendant further answering states, that it is true that it was operating said train over a track where the ties stood up about six inches from the ground, but denies that the same stood up fifteen inches from the ground and made a man-trap into which plaintiff was thrown. It denies that if the said ties had been filled in when plaintiff fell into the track that he might have escaped injury. It denies that by reason of the condition of said track plaintiff was caught in between the same and thereby suffered the loss of his leg.

Defendant denies that plaintiff was just beginning to run into the new yards and upon the new track, and denies that its dangerous condition was unknown to plaintiff, and denies that the alleged condition of the ties in the track had anything whatever to do with plaintiff's alleged injury.

Defendant further answering says, that if plaintiff was injured as alleged in his complaint, the said injury was caused by his own carelessness and negligence, and without any fault on the part of this defendant.

Wherefore, defendant, having fully answered, prays to be dismissed with its costs.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for Defendant.

Filed April 5, 1901. W. P. Feild, Clerk.

13 And on April 12, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and the parties announcing themselves ready for trial a jury came, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, being twelve good and lawful men of the district, who were duly tried empanelled and sworn well and truly to try the issues joined between the plaintiff and the defendant and a true verdict give according to the law and the evidence, thereupon the jury proceeded to hear the evidence as well on the part of the plaintiff as of the defendant, and the trial hereof not being concluded, the same is continued until to-morrow morning at half past nine o'clock.

And on April 13, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and come the jury, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, and
14 the trial hereof not being concluded on yesterday the same is now resumed, and the jury having heard all the evidence and argument of counsel and having been charged and instructed by the Court, retire to consider their verdict.

Which charge of Court to jury is as follows:

Gentlemen of the Jury: In this action, which has been brought by the plaintiff against the defendant to recover $5 000 for injuries received by him while he was in the employ or service of the defendant company and which resulted in the loss of his leg, the claim for damages made by the plaintiff is based upon two distinct causes or acts of negligence on the part of the railroad company.

It is claimed, first, that the company was guilty of negligence in having the step or plate in front of the pilot of the engine insecurely fastened, so that when this plaintiff, in the discharge of his duty, stepped upon it, while the train was in motion, it gave way, precipitating him to the ground, and by reason whereof he lost his leg and suffered the injury for which he has now instituted suit.

Secondly, it is claimed that the company was guilty of negligence also in keeping the track going into the yard and on which this accident occurred in a condition whereby this accident was in part caused. The specific ground is that between the ties the track was not filled up, so that when this man fell his foot was caught in it, and on account of the deep depression between the two ties he could not extricate his foot, and but for that fact he would not have lost his leg and sustained the injury for which he now sues.

These are the two grounds of negligence which are charged against the railroad.

The railroad company denies, first, that the step was not properly fastened. They say that the step or plate was properly fastened, and that in any event, so far as this plaintiff is concerned, he had no business on the plate.

They also deny that they were guilty of any negli-
15 gence in keeping the track in the condition which it is shown to have been in, that is, that the ties were lying upon the ground and the space between the cross-ties was not filled in.

They deny that under the conditions then existing, that was negligence; and they have set up as a further defense contributory negligence on the part of the plaintiff, or in other words, they say that even if it be true that the railroad company was guilty of negligence yet this accident would not have happened but for the fact that the plaintiff himself was guilty of contributory negligence, that is, such negligence which made this accident possible.

And they set up as a cause of this plea the fact that he had no business, while the train was in motion, to attempt to board the engine on that little narrow step in front of the engine attached to the pilot, and if he did so he did it at his own peril and at his own risk, and if by reason of stepping on it he suffered any injury, the company is not liable.

Now, I want to explain to you as briefly as possible the law which is applicable to the issues which are involved. I want to state to you at the outset, gentlemen of the jury, that under

our system of jurisprudence a jury is as much a part of the court as the judge is. The law divides their duties by confining to the judge exclusively the determination of all questions of law. It is the duty of the judge to tell the jury what the law is, so far as it is applicable to the case.

On the other hand, the determination of all the facts in the case is left exclusively to the jury. Your duties and your prerogatives in determining the facts are just as great as those of the Court are in determining what the law is.

If at any time in my charge to you I allude to some of the testimony which has been introduced here, I want you to remember that while I shall try not to express any opinion as to what your finding should be, yet if I should say something that might lead some of you to believe that I have a fixed opinion as to what your verdict should be or what your find-
16 ings of the facts should be, I want to say to you now in advance that you are mistaken, and to any opinion which I may express on the facts you are to pay no attention, because it is you and you alone who must determine the facts and you must do it in accordance with the dictates of your conscience and in conformity with your oath to render a true and correct verdict according to the law and the evidence in the case.

The Court has no power to interfere with you in the determination of any of the facts, and you do not have a right to interfere with the Court in determining what the law is.

Now, I will call your attention to the law in the case.

The duties which a railroad company, or any other employer, because there is no difference between a railway company and any other employer, owes to its employes are quite different from those which it owes to its passengers.

What it owes to its employes is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident.

You are, therefore, to determine from the evidence the first question raised by the plaintiff,—whether the step or plate in front of the engine and attached to the pilot, on which plaintiff tried to step at the time of the accident, was, by reason of the defendant's negligence, insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was in-

jured as alleged while trying to get on the step in the proper discharge of his duties as a brakeman. That is the first question for you to determine, "was that plate fastened securely or not?"

If you find from the evidence that it was properly fastened, then you need pay no more attention to that particular part of the case.

But, on the other hand, if you find that it was not properly fastened, then there are other questions to be considered by you in connection with the matter.

17 The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

If under the rules either as communicated to him or as he should have known them by the exercise of due diligence he was not permitted to get on there, yet in violation of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving way and he cannot recover.

But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by reason of having done so, then he cannot recover.

Now, as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in a reasonably safe condition and by reason of that failure the plaintiff by no negligence of his own, sustained the injury, complained of, then it is liable; provided also that the plaintiff, at the time of the accident, did not know, or by the exercise of reasonable diligence could not have known, the condition of the track, but if he knew the condition of the track or could have known it by the exercise of reasonable diligence, and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover.

Now, as to the duty of providing a reasonably safe place for the servant's work, the Court instructs you that when a place is in such condition as similar places under like conditions

are usually kept by well-managed railroad corporations,
18 then the company has fully discharged its duty towards its employes and is not liable for injuries sustained by its servants, for the law conclusively presumes that when a man accepts employment which is of a dangerous nature, such as railroading, he is willing to assume the risks incident to his employment and will be entitled to no damages for injuries sustained in such employment, unless it is shown by the evidence that the employer or master was guilty of negligence by failing to provide such a safe place for the servant to perform his duties as under like conditions others engaged in the same business are in the habit of furnishing.

Now, in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company was guilty of negligence in allowing, at that time and that place, the track to remain with the spaces between the cross ties unfilled, whereby its servants or employes might get their foot caught and perhaps get injured.

Now, in determining what would constitute negligence so far as this case is concerned, you are to take into consideration the place where this accident occurred. The evidence tends to show that the place where this injury occurred was the railroad yard.

Now, as a general rule, where the tracks are in large railroad yards where there is a great deal of traffic going on and where a great many employes walk to and fro in crossing the tracks, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them.

But, on the other hand, you are also to consider the fact that these yards had but recently been made, and you are to determine from the evidence that has been introduced, giving due weight to the testimony of each witness who has testified, considering for the purpose of determining the weight to be given to his evidence, his knowledge, his interest in the matter, and his experience.

Now, after you do all that, then you are to determine from
that evidence whether, in view of the fact that this
19 yard had but recently been made, it was proper or improper to leave it in the condition the evidence shows it was in.

It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence,

not extraordinary but ordinary diligence, to have filled up this track—the spaces between the cross-ties—before the time when this accident occurred on the night of February 5th, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that the road bed might settle and the yards be drained, as was testified to by one of the witnesses.

Now, as I stated to you before, gentlemen of the jury, in determining what weight should be given to the testimony of each witness, you are the sole judges of it, but I want to say to you and I am simply expressing my own opinion that you should consider a man's experience, his interest in the matter, and where a man has been superintendent, and engaged in making yards, planning them and laying them out, his testimony is entitled to much greater weight, in my opinion, than a man who simply worked as a common laborer, or even a section boss or a boss over a few men.

But then, as I stated to you before, you are the sole judges of the credibility of each witness and it is for you to determine which of the witnesses is entitled, where there is a conflict in their evidence, to be believed.

Now, you are also to take into consideration whether it is usual and proper for a well-managed railroad, when a new yard is laid out and has just been completed, to permit the spaces in between the cross-ties to remain open for several months, and whether it is usual to have freight trains running over the tracks into the yard in the condition that this track was at the time this accident occurred.

Now, the knowledge, on the part of the plaintiff of
20 the condition of the tracks as well as of the machinery is very important, for if an employe has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is not the kind of danger that I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

Now, if he sees that the place is dangerous and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having it not filled up, for the servant has a right

to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the fact, then he must do so at his peril.

Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or step as the evidence shows it was in or not.

If he did not know it, and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own expreience told him he should not get on and when there was other provision made for a man to get on a train while it was moving, then, gentlemen of the jury, he cannot recover.

21 And I want to say to you that a mere custom does not justify a person boarding a moving train where it is dangerous to do so; his duty is to signal the train to stop if it is necessary for him to get on, and if he is injured by reason of trying to get on a train while in motion, and it is seen to be dangerous, he cannot recover, the law being that although the negligence of the railroad company may be the principal cause of a man's injury, yet if he was careless himself, if the want of attention to his own safety contributed in any considerable degree to his injury, the railroad company is not liable.

An employe cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose commands he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad and he fell and was injured and the injury was caused by the fact that the track had not been filled up between the

cross-ties, and you further find that under the evidence and the law as I explained it to you a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover.

But, on the other hand, if he had no business to get on that plate, but his duty was to jump on the back step, or the step back of the engine which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not; if that was the proximate cause of the injury he received, he cannot recover.

If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he
22 knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact that it was a new track, then the plaintiff cannot recover.

Now, in determining whether this plate was intended to be used as a step to get on when the train is in motion, you must consider the fact that this step was but a narrow strip, that to stand on it a man's foot must be sidewise; while, on the other hand, switch-engines which run both backwards and forwards have a regular step wide enough for a man to step on, thus showing that apparently there is a distinction made by railroads between the ordinary freight engine and the switch engine. And it is claimed by the defendant in this case that there is a difference in the duties of the employes on trains drawn by these respective engines.

I do not know that there has been any evidence introduced on that point, gentlemen of the jury, but I want to say to you that if any evidence has been introduced tending to show that subsequent to the date of the injury the defendant either removed the plate or step from the pilot of the engine or filled in the spaces between the cross-ties, such evidence is not to be considered by you in this case as evidence that it should have been made prior thereto.

Now, gentlemen of the jury, if your verdict is for the defendant, that is, if you believe under the charge of the Court and the evidence that has been submitted to you that your verdict should be for the defendant, then you will simply say, "We, the jury, find for the defendant," and you need not consider anything further in this case.

But if you think and your verdict is that the plaintiff is entitled to recover a judgment, then, gentlemen of the jury,

the next duty you have to perform is to assess the damages; that is, you must determine what damages should be awarded to the plaintiff against the defendant by reason of the
23 injury sustained by him in this accident, if the defendant is liable.

I will state what you are to consider in assessing these damages.

He is entitled to the expenses incurred by him in seeking to get cured; that is, money expended for medical attendance and drug bills during that time.

He is entitled to damages for his loss of time. If, on account of the accident, he was unable to perform any work, the time he could do nothing he is entitled to be compensated for. He is entitled for what you think will compensate him for the difference in what he could have earned if this accident had not occurred and what he can earn by reason of having lost his leg. The difference between these two sums he is entitled to, taking into consideration what you believe his time is worth.

In determining the difference in wages which he may earn hereafter, evidence has been introduced to show what, according to the life tables, the probabilities are as to the duration of his life hereafter. I believe the evidence introduced tended to show what his age was at the time the injury took place and the probabilities of living are 33 years and a fraction over, 33 9-10 years. Now, of course, it might be less.

Now, gentlemen of the jury, I want to say to you that these tables are not conclusive on you, because you know that no one can say that a man is going to live a certain number of years. These tables are based upon averages and the experience of men who have devoted their time to it and are thoroughly conversant in the science of making up these tables. This is a matter for you to consider, but it is for you finally, gentlemen of the jury, to determine what you think the probabilities of his life are, that is, how long he may live.

These are damages that can be calculated by you with mathematical precision. You can take a piece of paper and a pencil and set down the proof showing that there was so much paid out for medicine and doctor's bills, I believe he testified $100.00. There was evidence tending to show
24 that he was earning $65.00 per month and that he has been out so many months without doing anything, so you can figure that time at $65.00 a month.

You may also figure about how long he is going to live and what he is likely to earn and what he would have earned if he had not been injured.

But now there is one other matter of damages which is to be considered by you about which the court nor anyone else can help you and that is the damages that the law allows to parties that have been injured and suffered great pain, the damages allowed for the pain and suffering, both mentally and bodily.

That is a matter, gentlemen of the jury, that you must use your own judgment about, taking into consideration a man's condition in life, his station in life, his occupation and all these matters, and then determining what, if he is entitled to any, damages would be a reasonable compensation for the pain which naturally a man must suffer both mentally and physically if he is injured as this man has been.

But, of course, gentlemen of the jury, in assessing this damage, you must be guided by the same rules as you will be guided in weighing other testimony, and that is this, to have no bias or prejudice for or against either party to this action.

The fact that this man is a helpless cripple and the other party is a railroad is a question that must not in any way influence you when you render your verdict.

The question which you are to decide, gentlemen of the jury, is simply, not what you would like to see done but what ought to be done according to the oath which you have taken; and whatever your conscience tells you you ought to do, do that and your verdict will be right.

I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employes, otherwise it is liable.

Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant and was found to be in perfect condition, then if within a short time before the accident occurred—if after it left, say some central place, Forrest City or Brinkley, on its road for some reason—or a short time before it reached here, something unknown or unforseen caused it to become loose, then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order.

Now, then, that you are to consider.

If you find that it has exercised due diligence such as any ordinarily reasonable man would exercise in matters of that kind, then they would not be liable.

But, on the other hand, if they had not and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer if its servants' or employes' safety, regardless of his own diligence.

All it undertakes to do is to keep the machinery and its right of way and place where they work in good and proper order and use such diligence as a prudent and careful man would use. And the company is not liable for any defect of which an employe has knowledge at the time.

You may now retire and consider of your verdict.

Filed April 13, 1901. W. P. Feild, Clerk.

And on April 15, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Comes the plaintiff by Blackwood & Williams and
26 Joseph W. House, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and come the jury, to wit: J. C. Rogers, C. D. Peerman, C. J. Holt, J. A. Carpenter, E. A. Nickels, H. T. Mathews, W. S. Veasey, R. Wood, W. C. Brents, J. D. McLaughlin, C. W. Keatts, and W. A. Counts, and return into court the following verdict, "We, the jury find for the plaintiff and assess his damages at $5,000. (Signed) Edgar A. Nickels, Foreman. 13th of April, 1901."

It is therefore considered, ordered and adjudged that said plaintiff, Thomas Tennessee, do have and recover of and from said defendant, the Choctaw, Oklahoma & Gulf Railroad Company, the said sum of five thousand dollars ($5,000,00), assessed as aforesaid, for his damages, together with all his costs herein expended, and have execution therefor.

And on June 4, 1901, the following proceedings were had, to wit:

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Now, on this day comes the plaintiff by Joseph W. House, and Blackwood & Williams, Esqs., his attorneys, and comes the defendant by E. B. Peirce, Esq., its attorney, and said defendant by its said attorney presents here its bill of exceptions, and the same being examined by the Court and found correct is signed by the judge thereof and ordered to be made a part of the record in this cause; and said defendant also files its assignment of errors and presents its petition for a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, which is granted by the judge and citations to the plaintiff signed by the judge.

And it is further ordered by the Court that upon the execution of a bond with good and sufficient sureties by the defendant in the sum of $6,000, conditioned as required by law, and
when approved by the judge of this court, the same
27 shall act as a supersedeas on the judgment rendered herein.

And thereupon said defendant presents its bond in the sum of six thousand dollars, which is approved by the judge of this court, and it is ordered that the judgment herein shall be superseded.

(Signed) JACOB TRIEBER, Judge.

Which bill of exceptions is in the words and figures following:

28 In the U. S. Circuit Court, Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

Bill of Exceptions.

This cause coming on for trial on the 12th day of April, 1901, the plaintiff, to sustain the issues on his part, introduced the following testimony, to wit:

Wesley Graves, (colored) being duly sworn, on behalf of the plaintiff testified as follows:

Direct Examination.

Q. What is your name? A. Wesley Graves.
Q. How long have you known the plaintiff here?
A. Well, I guess about six years.

Q. Did you know him last February? A. Yes sir.
Q. Do you know what business he was engaged in?
A. He was brakeman on the C. O. & G.
Q. What business were you engaged in?
A. I was brakeman for the same company.
Q. Were you brakeman on the occasion he got hurt over there? A. Yes sir.
Q. Did you see him get hurt?
A. I didn't see him when he got hurt, but I went over there in about twenty minutes.
Q. Where was he when you saw him?
A. He was laying in the caboose.
Q. About what time of night?
A. I disremember what time of night.
29 Q. Well, was it before midnight?
A. I think it was.
Q. What was his condition then?
A. He was laying in the caboose and his left leg was all mashed up right along by his knee and the toe of his shoe.
Q. Had his leg been cut off then? A. No sir.
Q. Were you present when it was cut off? A. No sir.
Q. How long did you stay with him?
A. I think I stayed with him until they brought him over on this side of the river.
Q. You say his leg was all mashed up? A. Yes sir.
Q. Was he conscious? A. Yes sir, he knowed me.
Q. Did you see the engine he was run over by?
A. Yes sir.
Q. What engine was that? A. C. O. & G. engine No. 5.
Q. How long had you known that engine?
A. I don't exactly remember when she come down. She come down from the west end. I have been around her ever since she come down, I think it was a little before Christmas.
Q. What make was it? A. Rhode Island.
Q. How large was that engine?
A. It was quite a large engine, about an 18-inch.
Q. Did you ever run with that engine? A. Yes sir.
Q. Did you ever make a trip with it?
A. Yes sir, made a trip with her three or four days before that happened.
30 Q. Do you know where this step is? I mean where it is put on to the engine? A. Yes, sir.
Q. Describe to the jury where this step was.
A. It is bolted on to the bottom of the pilot, sometimes called the cow catcher, about 6 or 8 inches from the point of the pilot. It is wide enough for a man's foot to slip in, and there is a groove on the outside to keep a man's foot from slipping. It is bolted under the pilot.

Q. What kind of material was that step made of?
A. It's iron, sheet iron.
Q. Where is it bolted?
A. It's bolted right under the pilot.
Q. Is it bolted to the metal part of the pilot?
A. No, sir, it's bolted to wood.
Q. Do you know anything about the condition of that step before this accident occurred?

(Counsel for defendant objects.)

Q. Immediately before this accident, or when the accident occurred, can you say what condition it was in about that time?

(Counsel for defendant objects.)

Court: Do you know what condition it was in immediately afterwards?
A. I couldn't say what condition it was in.
Court: Do you know what its condition was a short time afterwards?
A. A short time afterwards it wasn't there.

(Counsel for defendant objects.)

Court: Then you do not know the condition of the step at the time of the accident?
A. I couldn't say what condition it was in.

Mr. Blackwood:
Q. Did you see it early next morning?
31 A. Early next morning I went down and looked at the engine and, the piece had been removed.

(The defendants objected to each of the above questions and answers relative to condition of step after accident and asked that the same be excluded from the jury because the answer was incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. When was the last time you saw it before you saw it that night?
A. It was the last trip that I made with the engine.
Q. How long was that before this accident?
A. I don't think it was more than three or four days.

32 Thomas Tennessee, (colored) plaintiff, being duly sworn, on his own behalf testified as follows:

Direct Examination.

Q. Your name is Thomas Tennessee? A. Yes, sir.
Q. How old are you, Thomas?

A. Thirty-three years old.

Q. How long have you been railroading?

A. About 12 or 15 years.

Q. In what capacity? A. Brakeman and switchman.

Q. How many roads have you worked for?

A. I have worked for 17 or 18 different roads.

Q. Did you ever work for any roads in the State of Arkansas? A. Yes, sir.

Q. What ones? A. The Iron Mountain and Choctaw.

Q. How long had you been at work for the Choctaw at the time you were hurt?

A. I went to work in December and worked a part of December and laid off in January. I got my foot hurt and laid off in January and then didn't go back any more until the 5th of February.

Q. Where did you run in December?

A. A part of the time I run from Brinkley to Memphis, and then when they run the first schedule in from Memphis I come through on the first train.

Q. When was that?

A. In December, the 13th or 14th of December.

Q. Where did you run from then on to the first of January or February? A. We run from here to Memphis and back.

Q. What track did you run in on?

A. We always generally come down the old main
33 line. They didn't have the new yards fixed then. Later on I headed into the new yards about once before I laid off.

Q. This jury probably do not know where the old main line was? Where did it go, down into Argenta?

A. Yes, sir, it come right straight down into Argenta.

Q. Where did the main line afterwards run?

A. The main line still run down that way but they put in a lead, and there are seven or eight tracks in between the lead and the main track. When the new depot was finished, the main afterwards turned and went across the bridge, and this lead line was the old main line.

Q. You commenced, you say, about the middle of December to come into Little Rock. How many trips did you make before you laid off?

A. I made one pretty near every day up until the time I laid off.

Q. What were you running on?

A. I was running on a freight.

Q. What time did it get in here?

A. Well, we generally got here about 9:30 or 10 o'clock. Sometimes in the morning we got in on time, at 6:10.

Q. Was that before day? A. It was about daylight.
Q. When did you generally get out?
A. Generally about 6:40 the next morning.
Q. Was that daylight?
A. Yes, sir, just about daylight, but we had to use lanterns.
Q. And you continued to run on that line until when?
A. Well, we run in on the old main line until about Christmas. I went out Christmas eve morning and went to Memphis and didn't get out of Memphis no more until about the 27th. When we come back from Memphis we come into the new yards. I come down the main line and the yardmaster told me to back up and head into the new yards, and I headed into the new yards.

Mr. Peirce:
Q. That was when you were going to Memphis?
A. No, sir, coming this way.
34 Q. Did you make any more trips?
A. No sir, I laid off.
Q. Did you lay off during January?
A. Yes sir, didn't work at all.
Q. And you laid off, were you discharged?
A. No sir, I laid off myself, I got my toe cut and laid off.

Mr. Blackwood:
Q. When did you return to your job again?
A. I returned to work on the 4th or 5th, I think it was the 5th, of February.
Q. Where did you go when you came back to work?
A. We went over to Memphis.
Q. When did you get back?
A. We left here Monday morning, and started back Tuesday morning and got here about 10 o'clock that night.
Q. Where did you start from on that trip?
A. We started from Hopefield when we started back this way.
Q. Where did you start from going to Memphis?
A. We left from the new yard, we picked up our train around on the lead, I think it was track No. 8.
Q. What time did you leave?
A. We left here that morning about 7 o'clock, it may be a little after, about 7:40; we had to back over to the depot over the bridge before leaving.
Q. Did you start from the depot on this side? A. Yes sir.
Q. What time did you start over there at the yards to come over this way?
A. I don't know exactly, I think it was about 7:40. We had to go and get a caboose and go across the river to the de-

pot and see if there were any passengers, and we would stay over there about 15 or 20 minutes, and then come back on this side of the river and leave the caboose on the main line and pick up our train.

35 Q. What time did you pull out of the new yards over there that morning? A. About 8 o'clock.

Q. What time did you leave from the Little Rock side?

A. About 7:10.

Q. Then you came over—got your train and came across?

A. No sir, we went across with the engine and caboose then came back and picked up our train on the Argenta side, and goes to Memphis.

Q. You went over to Memphis and came back?

A. Yes sir.

Q. You got back here about what time?

A. About 10 o'clock at night.

Q. That was the 6th of February, last year?

A. Yes sir.

Q. Just tell the jury what happened when you got to the yards.

A. Coming in, I rid out from Carlisle—from Lonoke—I rid out from Lonoke and I picked up a fellow and he rode with me into the yards here. I was sitting on the side of the train talking to him, and when we come into the yards I goes down to the engine. I jumps on the tank of the engine and goes on down into the engine. I gets down and throws the main line switch, and my lamp went out. I came back to the train and lit it, and goes on down and throws another switch and then walks on about 60 feet further and throws another switch. After that I undertook to get on the engine, at least, I did get on the engine, on the pilot, to ride on down to the lower end of the yards to see if the switches were all lined up. When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go.

36 Q. How was your foot caught?

A. My foot got hung between the ties, between the bottom of the ties, and held it fast. When my foot went down I couldn't get it out.

Q. Then the condition of the ties is what made the accident possible? A. I couldn't get my foot out.

Q. Explain to the jury how those ties are fixed.

A. The ties were laid up on top of the ground and I suppose it was about 8 or 10 inches, probably more than that, from the top of the ties to the ground. When my foot went down I pulled my leg with all my might and couldn't get it out. I pulled all the toe of my shoe off, and bent the instep of my shoe back. I pulled with all my might, but I seen that I couldn't get it out and just give up and let it go.

Q. What was the result?

A. Well, the engine run over me when I fell, run over my leg. I hallooed as loud as I could to make the engineer hear me, but he didn't see me. But he must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could.

Q. How fast were they running?

A. They were running about four miles an hour.

Q. Is that slow or fast? A. That's very slow.

Q. When you got your foot caught under there, the train ran over you and mashed your leg?

A. Yes sir, mashed it all to pieces.

Q. Broke the bone?

A. Yes sir, broke the bone, mashed my knee cap all to pieces.

Q. Try as you might you could not get it out? A. No sir.

Q. Was the hurt painful? A. Yes sir, it was.

Q. Just tell the jury whether you suffered any or not?

37

A. Why, I suffered just as near death as any man could suffer death and not die. It wouldn't have been as hard to die.

Q. Did you lose consciousness?

A. No sir, I was perfectly conscious all the time.

Q. How long were you left there on the ground?

A. I lay there about an hour I reckon. I lay there and begged them to send for a doctor. I told them to send for some doctor and let him put morphine or chloroform or something on my leg.

Q. What was done with you?

A. After I lay there about an hour, or longer I suppose, an engine from the west then pulled down into the yards and they took the engine off the other train and picked up our caboose and pulled down to where I was laying on the ground. Then they stopped awhile and said they didn't know how they would get me into the caboose. I told them if they would get close to me and help me I could pull up into there. Then a

man got on each side of me and I put my arms around them and raised myself up into the caboose, I put my hand on the step of the caboose and eased myself back and laid down.

Q. Where did they take you then?

A. I was brought to the Choctaw depot where an ambulance met me and I was taken out to Second and Center to the Little Rock infirmary.

Q. Was your leg amputated then?

A. No sir, they carried me into the house out through one room and out into another room and one of the sisters suggested that they would have to carry me upstairs. They put me on a cot and took me upstairs. I laid there about an hour or longer and kept asking them how long before the doctor would come. After a while the doctor came, there were two doctors, and they said they believed another doctor would like to take part. They called him up over the 'phone and I waited there until he came before my leg was amputated.

38 Q. Who amputated your leg?

A. I think Dr. Runyan was the chief operator. Dr. Lenow was the surgeon for the Choctaw Infirmary at that time, but I don't think he had much to do with it. Dr. Runyan did the best part of the work.

Q. Dr. Lenow was the surgeon of the railroad?

A. Yes sir, and he called in the other doctor.

Q. And he said they would have to cut your leg off?

A. Yes sir.

Q. And they took it off? A. Yes sir.

Q. How long were you sick with it?

A. I laid up in the hospital from the 6th of February until to the 16th day of April.

Q. Did you have any doctor's bills?

A. No sir, not in there I didn't.

Q. Any medical bills?

A. I paid medicine bills after they discharged me.

Q. What did your medical bills amount to?

A. All my medical bills and doctor's bill was about $100.00.

Q. Did you pay those bills on account of this injury?

A. I laid it to that. After I got out I [—] taken down sick with pains in my legs, and I had chills. My leg was sore a long time after I was discharged.

Q. The injury brought it on?

A. Yes sir. I had pains in my leg and big sores came on it.

Q. Were they painful?

A. Yes sir. I couldn't raise myself up, or sleep at night. For a while I couldn't bear to get on my crutches.

Q. Did you have any other effects from the injury?

A. I lost the use of this arm. I couldn't use it until last Christmas, I just began to use it since Christmas. In December that hand was right down that way, I couldn't raise it up. I showed it to the doctors.

39 Q. What was the condition of it before?

A. I never had any trouble with it before.

Q. How much were you making at the time of the accident? A. I think we were making $65.00 a month.

Q. What was the condition of your general health?

A. I was in good health. Never had been sick in my life. I was strong and active.

Q. You are thirty-three years old now, you were thirty-two then? A. Yes sir, thirty-two.

Q. Did you know that there was anything the matter with the step when you got on it? A. No sir.

Q. Did you know the condition of the ties, whether they were filled in or not at that time?

A. No sir, I didn't ever pay any particular attention to them. I never had been in there more than once or twice and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two, or three and sometimes on the lead.

Q. You don't recollect ever having been on that track at all? A. No sir, not that I know of.

Q. What kind of a night was it?

A. Well, it was raining, it was dark, it had been raining all day.

Q. After you were hurt and were lying there on the ground, how far from the track were you?

A. About a foot and a half from the track.

Q. Did you notice the condition of the track?

A. The ties were not filled in. I asked for my lantern and had it lit. I set it on the side of the track so if any engine came into the yards, they wouldn't run over me I raised up and looked around at the ties and there wasn't any dirt between them.

Q. Was there anything there between the ties?

A. No sir, just laying up on the ground.

Q. Do you know what is the customary and safe way to fix yards?

(Counsel for defendant objected to the above question as incompetent, irrelevant and immaterial to the issues in this cause. The Court overruled said objection and the defendant saved its exceptions.)

40 A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to

get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

(Counsel for Deft. objects to answer for same reason. Objection overruled and Deft. excepts.)

Q. If it had been filled in level with the top of the ties, could you have got your foot caught in there? A. No sir.

Q. If it had been filled up level with the top of the ties, you could not have got your foot caught? A. No sir.

Q. If you had just slipped off as they claim and the ties had been filled in level, could you have got your foot out of the way of the engine?

A. If the track had been filled in level and I had slipped off I could catch myself. If they had been filled in level there would not have been any hole to get your foot caught in. I have been on engines before and my foot has slipped off and hit the ground and I could hold by my hands and raise up. In other yards where the ties were level I have slipped off lots of times and caught myself. There is no chance to get your foot caught in there. If you slip off you can raise your feet right up again.

Cross-Examination.

Q. You say you have slipped off pilots lots of times before and could get out of the way? A Yes sir.

Q. Then you know that a man is liable to slip off when he attempts to get on those steps? A. No sir.

Q. You have fallen? A. Yes sir.

11 Q. You know that when a pilot is slick and a man attempts to get on that step he is liable to slip off?

A. I don't know.

Q. You stated that you had fallen off lots of times and were able to recover yourself?

A. Yes sir, I would be able to catch myself.

Q. You know that a man is liable to slip off those steps if he undertakes to get on there in wet weather?

A. I don't know.

Q. You have slipped off?

A. Yes sir, I have slipped off wet days and dry days. I have seen some break off.

Q. You know that men do slip off dry days and wet days, and that some break off? A. I have seen some break off.

Q. How long had you been working for the Memphis and Little Rock road before you went to work for the Choctaw?

A. I don't know. I think the Choctaw, Oklahoma and Gulf had it in possession when I went to work.

Q. When did you go to work? A. In December.

Q. Did you ever work for the Memphis and Little Rock road prior to that time? A. No sir.

Q. You went to work in December? A. Yes sir.

Q. When did they commence to put in those new yards over there? A. I don't know exactly when.

Q. Well, to the best of your recollection?

A. I couldn't say, I wasn't here.

Q. Was the new yard there when you got here?

A. It wasn't done.

Q. How do you know? A. They weren't using it.

42 Q. Were they using the other yard? A. Yes, sir.

Q. How many times had you been over there?

A. When I first came in here?

Q. Yes, sir. How many times were you in there altogether?

A. Only when I would go out. When I would go and put the engine away I wouldn't go back until next morning.

Q. Where did you live when they were working there?

A. 410 Maple Street.

Q. Were the trains going out the old Little Rock and Memphis road? A. Yes, sir.

Q. And they were not using the new yard? A. No, sir.

Q. Whenever you made a trip out you had to pass through the new yards or pass the old track, didn't you?

A. When we went out, we made up our trains on the scale track.

Q. Where is the scale track with reference to the new yards? A. It's down on the lower end to the right.

Q. That's below these new yards? A. Yes, sir.

Q. Sometimes you went over that track?

A. Yes, sir, we generally head from the old main line when we first commenced, and cut the engine off next to the roundhouse.

Q. At any rate if you went down from the old yards you had to pass below the new yards? A. Yes, sir.

Q. When you came back again you had to go along the old line out through the new yards? A. Yes, sir.

Q. Are the new yards in sight from the track?

A. Yes, sir.

Q. What was your business on those freight trains?

A. I was head brakeman.

43 Q. What was your position going out?

A. Going out of the yards, it was on top of the train.

Q. Now, if you were on top of the train going out you could see the new yards, couldn't you, if you looked?

A. I couldn't look at the new yards and watch my business.

Q. The only thing to keep you from seeing them is the fact that you didn't look? A. Yes, sir.

Q. You do look around, don't you?

A. Yes, sir, sometimes.

Q. You could have seen it if you had looked over there?

A. Yes, sir.

Q. How many times did you say you had gone out of the new yards? A. Not over three times.

Q. What part of the new yards did you leave from?

A. Well, the first time our train was made up on No. 1 track.

Q. Did you have to help make up the train? A. No, sir.

Q. What is your business just before you start?

A. We haven't got any duty at all until we get our engine and couple it on to the train.

Q. This train was standing on the first track?

A. Yes, sir.

Q. How did you get up there?

A. Come up on the main track.

Q. Did you walk? A. No, sir, rode the engine.

Q. What time was it when you left on that first trip?

A. About 6:10 in the morning.

Q. Was it dark?

A. Yes, sir, we had to use lanterns.

Q. What time did you get back on that trip?

A. Sometimes we get in in the daytime and sometimes at night.

Q. Now, the first trip, do you remember whether you got back in the day or at night?

A. I don't just exactly remember. I think the first
44 trip we were out two or three days. I don't know whether it was in the day or at night or when it was we got in.

Q. The first trip that you came back in the daytime, what track did you come in on?

A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use. So I backed out and headed down the new yard.

Q. Could you see, when you headed in on that track, that those ties were not filled in?

A. Yes, sir, I saw some of them were not filled in.

Q. Were any of the ties on that new track filled in?

A. Not as I know of.

Q. All that you know of were not filled in? A. Yes, sir.

Q. Do you know of any that were filled in?

A. Yes, sir, I think they were filled in up next to the lead, they were filled in next to the main line.

Q. That is, where if coupled on to the main line, but after you got down into the new yard you don't know of any that were filled?

A. I didn't pay any particular attention to it.

Q. Do you mean to say that you would come in on that track and not pay any attention to the ties?

A. All I paid attention to was the switches.

Q. If you were standing there turning a switch, you couldn't help but observe whether the ties were filled in or not?

A. No, sir, I don't know whether I could or not. A man isn't on the ties, he throws the switch. Coming in, they might not stop the engine and you have to be in a hurry to get the switch thrown.

Q. Do you mean to say that you throw the switches without looking at anything else?

A. I look at the switch and see if it matches the rails.

Q. You say at the time of the accident, you left the
45 yards about 8 o'clock that morning?

A. Yes, sir, we left about 8 o'clock.

Q. You got back about 10 o'clock that night?

A. No, sir, the next night, Tuesday night.

Q. Did you have your lantern in your hand when you came down to throw these switches? A. Yes, sir.

Q. How did you go along?

A. I walked on the outside of the track to the first switch.

Q. Why were you walking on the outside?

A. I was trying to find a clear track, I had to walk out there to see if the track was clear, so I could see around the curves.

Q. Did you look to see if these ties were filled in or not?

A. No, sir.

Q. You had your lantern? A. Yes, sir.

Q. You could have seen?

A. Yes, sir, if I had taken time I suppose I could.

Q. What kind of a headlight did that engine have?

A. It had an electric headlight.

Q. Are not these electric headlights very brilliant?

A. Yes, sir, but you can't see around the curve.

Q. That wasn't on a curve, was it? A. Yes, sir.

Q. Didn't that electric headlight light light up the lead track down in front of you? A. Yes, sir.

Q. The train was on the lead track, wasn't it?

A. Yes, sir.

Q. And you said you got injured on the lead track?

A. No, sir, I got hurt on No. 3

Q. Do you mean to say that you had lined up No. 3 and the train was going in on No. 3? A. Yes, sir.

46 Q. So you had already passed the track the train was going to head in on and had lined up the switch?

A. Had lined that switch up for that track.

Q. No. 3 leads out from the lead track, doesn't it?

A. Yes sir.

Q. This headlight lit up everything in front of you, didn't it? A. Yes sir.

Q. If you had looked you could have seen whether the cross-ties were filled in or not, couldn't you?

A. I suppose I could if I had stopped to look.

Q. I will ask you if this electric head-light doesn't light things up very brilliantly? A. Yes sir.

Q. You could see objects three or four hundred yards in front, couldn't you? A. Yes sir, about that far.

Q. It is so light? A. It is very light.

Q. And if an engine with an electric head-light is moving down there and you are down there you can observe as well then the condition of the track as you can in the day time, can't you? A. A man's mind is not on the track?

Q. I am not asking you that.

A. Yes sir, if he was to stop and look he could.

Q. You say you had thrown this third switch?

A. Yes sir.

Q. You gave the engineer the signal to come ahead?

A. Yes sir.

Q. When you gave the signal for the engineer to come ahead, what position did you take in order to step on this engine?

A. When I gave him the signal I stepped over into the track to catch the pilot.

Q. Into the middle of the track?

A. No sir, not in the middle of the track, on the inside of the rails.

47 Q. You had your lantern? A. Yes sir.

Q. Did you observe whether the track was filled in or not?

A. I wasn't looking at the track, I was looking at the pilot of the engine.

Q. Did you look to see where you were stepping?

A. Yes, I had my light in my hand to look up at the pilot of the engine when it come to me.

Q. If you had looked down you could have seen that the ties were not filled in, couldn't you?

A. Yes, if I had looked down to my feet I could.

Q. You were standing there on the track with your lantern in your hand and the electric head-light shining?

A. Yes sir, but I pulled my hat down over my eyes.

Q. What did you pull down your hat for?

A. So the head-light wouldn't blind me.

Q. You were standing there on one of the ties?

A. Yes sir.

Q. And the electric head-light blinded you so you pulled your hat down over your eyes?

A. Yes sir, to keep it from blinding me.

Q. You were standing looking down waiting for the engine to come up to you?

A. No sir, I wasn't looking down. I had my eyes kinder looking slanting up.

Q. You pulled you hat down so it would be down just far enough to keep the light out of your eyes? A. Yes sir.

Q. That brought your line of vision somewhere near the top of the pilot? A. Yes sir.

Q. And you waited there? A. Yes sir.

Q. And you say it was raining that day?

48 A. It had been raining that day—all day.

Q. How many times had you been on that step that day?

A. Well, I don't know. Don't think I was on it more than once or twice.

Q. You were on it only once or twice?

A. We headed into some cars at Brinkley or Forrest City and I had to get on the pilot to couple them up. I went down and coupled to them and after we pulled out and shoved the cars back and stopped the engine, I then walked up and pulled the pin.

Q. A fellow cautioned you down there about getting on it, didn't he? A. No sir.

Q. Didn't you hear a brakeman call to you?

A. No, sir, there wasn't anyone there at all.

Q. Nobody cautioned you not to get on that step?

A. No sir.

Q. You say that step is about how large?

A. Well, I guess it is about four inches wide.

Q. About the width of your foot? A. Yes sir.

Q. The width of your foot would cover the whole step?

A. Yes sir.

Q. Didn't the company have a rule against brakemen stepping on this step?

A. I never had any instructions to that effect.

Q. Did you ever have a book of rules of the company?

A. No sir.

Q. How many roads did you say you had worked for?

A. About 17 or 18 different roads.

Q. Did those other roads have any rules? A. Yes sir.

Q. Didn't you get any when you came to this road?

A. No sir. I didn't get any.

Q. When did you first find out that the step was defective?

A. I didn't ever know it was defective.

Q. Didn't you allege in your complaint that it was
49 defective?

A. I said that in my judgment and knowledge it gave way with me. When a man is catching the pilot of an engine he throws his foot up on the step and leans his whole weight on that foot until he gets hold of the top of the pilot. I got on it with my left foot and when I leaned over to get the top of the pilot it went right down with me.

Q. You don't know whether your foot slipped off or not?

A. I know that my foot went down. It didn't slip that way, it went straight down.

Q. You are just of the impression the step went off?

A. I don't know whether it went off or not, it gave way with me. At least, it went down.

Q. Did you see the step after that? A. No sir, I did not.

Q. You didn't examine it after that?

A. I couldn't examine it, I couldn't get around.

Q. Did you ever write Mr. Henry Wood, the Vice-President of the road, a letter about getting the injury? A. Yes sir.

Q. Did you make any complaint to him about any defect in the step? A. No sir.

Q. You merely told him in that letter that your foot slipped and you fell?

A. I told him that the step gave way and I slipped off it.

Q. What was it you said you wrote him?

A. I wrote him that I slipped off the step, but I didn't know how come me to slip off.

Q. You didn't tell him the step was defective, did you?

A. I don't just remember whether I told him the step was defective or not. I know I wrote him a letter concerning it, but I couldn't tell what's in the letter. It's been quite a long while.

Q. Is this the letter?

A. That's my handwriting.

(Defendant reads from said letter as follows:

50 "North Little Rock, Arkansas, July 30, 1900. Mr. Woods, General Manager C. O. & G. and C. & M. R. R. Dear Sir: On the 6th of February, 1900, I slipped off the front end of an engine, while heading in the yard on the north side, and lost my leg while performing my duty in the transportation department.")

Q. You say you never saw that step after that? A. No sir.

Q. When you get on that step, there no hand-hold on that pilot? A. No sir.

Q. What do you grasp with your hands?

A. You can catch on the top of the pilot.

Q. When a man reaches for that pilot he leans forward, don't he?

A. Yes sir, he holds with his hand on top of the pilot, his hand on this draw-head of the pilot.

Q. Did you have that defect in your right hand at that time? A. Yes sir.

Q. Describe that defect.

A. I haven't got any, any more than that finger; I can use it as good as ever.

Q. All the fingers off except the little finger and the one next to it? A. Yes sir.

Q. That step slopes also, don't it?

A. No sir, it stands rearly level.

Q. Doesn't that step slant some? A. Which way?

Q. The same way the pilot slopes?

A. Yes sir, it sets angling that way with the pilot.

Q. That step is put there to make a pilot bar coupling, isn't it?

A. Yes sir, it's put there to stand on, to catch on the front end of the pilot.

Q. After you had lined up that third switch and the train was moving toward you and you undertook to step on
51 that pilot, if you had successfully made that step and had not been injured, what would have been your next duty?

A. Line up the next switch, ride on the engine and line up the next switch.

Q. But the train was left on that track, wasn't it?

A. Yes sir, but there is a cutoff switch ahead of there.

Q. These tracks are put there to leave trains on, are they not?

A. Yes sir, but sometimes the track don't hold them.

Q. If the track had held the train that night and you had left it on that track, what would have been your next duty?

A. If the track wouldn't hold us in the clear, I would have to line up this cutoff switch and then go back and cut my engine off.

Q. Suppose there had been no more switches to line up and the track would hold you, what would be your next duty?

A. If there hadn't been any more switches I wouldn't have been there.

Q. Wasn't your duty to cut the engine off and take it to the round-house?

Q. If there hadn't been any more switches there I wouldn't have been there.

Redirect Examination.

Q. You say there was another switch in ahead of your?

A. Yes sir.

Q. At the time you got hurt?

A. Yes sir, there was some more switches.

Q. When are you supposed to leave your engine and be done with your work?

A. Not until we cut it off and carried it to the round-house and put it on the proper track.

Q. And it is your business to stand on the front until the train is through? A. Yes sir.

Q. It was your duty to get on that step to make couplings and also to get on there and ride into the switch-yard.

52 A. Yes sir, it is the head brakeman's place to ride in front of the engine.

Q. Had anybody ever told you not to do that? A. No sir.

Q. And that was not only the custom of that road but of other roads? A. Yes sir.

Q. At the time you got hurt, when you tried to step on that step, state whether or not that was required of you by your duty? A. Yes sir, I was at my duty.

Q. Then you were in the discharge of your duty at that time? A. Yes sir.

Q. Now, why did you write to Mr. Wood? Did anybody ask you to put in a written application?

A. No sir, I was in a suffering condition and needed some money and was down sick and had nothing and wrote him simply for a compromise.

Q. You didn't say anything about the step at all?

A. No sir.

Q. And at that time, had you been able to make any investigation as to the cause of your injury?

A. No sir, I never made any investigation.

Q. When were you able to get out of the house?

A. I got out when they discharged me from the hospital. I was out about six or seven days and my leg swelled up and it commenced paining me and I told them to telephone to Dr. Inow about it to see whether he could do anything for my leg. He telephoned back to them to bathe it in warm water and the swelling would go down. When they discharged me from the infirmary my leg wasn't sound and well. I was down with it about 5 or 6 weeks after that.

Q. Did they send any one to you to investigate this case after you wrote this letter? A. No sir.

Q. Did you ever tell any of them that the step did not careen or break with you? A. No sir.

53 Q. You stated that the first time you went into the new yards, you started down the old track and they told you to head into the new yards?

A. No sir, not the first time. The first time I went into the new yards I went down the old main line.

Q. Who told you to go into the new yards the first time you went in there? A. Mr. Wilson, the yardmaster.

Q. He told you this yard was ready for use? A. Yes sir.

Q. When was that?

A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

Q. You went in on the new track, what sidetrack did you go in on? A. I think it was No. 1 track.

Q. You made how many trips after that into the new yards before you were hurt? A. About three.

Q. What tracks were you on before?

A. The first time we headed in on No. 2 and the next time all the tracks were filled up with cars and we went around on the lead.

Q. Where did that throw you?

A. That throwed us on the outside of the yard on the last track in the yard.

Q. What track were you hurt on? A. No 3.

Q. You never had been on that track before?

A. No sir, I never had headed in on No. 3 track.

Recross-Examination.

Q. Mr. Blackwood asked you at the time you wrote this letter if you had been able to get out to make an investigation of this step, what did you answer.

A. I told him that I had never been out to make any investigation.

54 Q. Do you mean to say that you had to go out to make an investigation before you could ascertain whether the step gave way or not?

A. I mean that I hadn't been able to get out to see about it.

Q. You said you had not been able to get out and make an investigation.

A. I meant I had never seen the engine.

Q. Do you mean to say that you would have to investigate the engine before you could tell whether the step gave way or whether you slipped?

A. No, sir, I was perfectly sure that the step gave way, for if my foot had slipped I could have pulled it right back.

Q. And when you wrote that letter you were just as fully advised as you are now? A. Yes, sir. I guess so.

Q. Now, he asked you if the railroad company had ever sent anybody to you and if you had ever told any of them that the step did not give way or break. You answered "no." I will ask you if you told any of them that it did give way and break? A. I told them that it give way with me.

Q. Whom did you tell it gave way?

A. I told Mr. Vaughan.

Q. Where? A. In the hospital.
Q. Did you tell anybody else? A. I told Mr. Kilpatrick.
Q. Who is Mr. Kilpatrick? A. The Chief Claim Agent.
Q. Where did he see you?
A. I don't exactly remember, he was talking to me about it and I told him.

Redirect Examination.

Q. Who is Mr. Kilpatrick?
A. He was the Chief Claim Agent at that time.

Recross-Examination.

54 Q. You said you were on that step two or three times that day.
A. I don't think I was on it more than once or twice.
Q. Did you notice anything wrong with the step then?
A. No, sir, I never had no idea of the step being loose and never paid any attention to it.
Q. If it had been loose, though, you would have detected it, wouldn't you?
A. Yes, sir, probably I might, but the engine was standing still one time when I got on it.
Q. It was running pretty fast, wasn't it? A. No, sir.
Q. If it had been loose you would have detected it?
A. I don't know.

Mr. Blackwood:
Q. Did you ever get on it when it was standing still?
A. Yes, sir.
Q. That's the only time got on, at Forrest City?
A. Yes, sir.
Q. There is no yard between here and Memphis, is there?
A. No, sir, no regular yard.

56 Wesley Graves, being recalled, on behalf of the plaintiff, testified as follows:

Direct Examination.

Q. You were on the stand a while ago, I will ask you when you saw this step next before this accident occurred to Tom Tennessee?
A. I seen it the last trip I went out with the engine and cautioned my brother not to try to catch on to that pilot, that the foot-plate was loose on it.

(Counsel for defendant objected to the above answer as incompetent, irrelevant, and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. Did you inspect it? A. Yes, sir.
Q. I believe you stated it was a Rhode Island engine.
A. Yes, sir.
Q. Do you know how old it was?
A. No, sir, I don't know exactly how old it was, but it was something like five or six years old. It come down from the west end.
Q. What trip did you make with this particular engine?
A. From Argenta to Memphis.
Q. Did you come back with the same one?
A. Yes, sir, come back with the same engine.
Q. You saw that step how long before Tom Tennessee was hurt? A. Something like three or four days.
Q. Could the inspector have found out the condition of that step if he had inspected it?

(Counsel for defendant objected to the above question as incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

A. Yes, sir.
Q. How?
A. It was loose, you could see the condition of it.

57 Court:
Was it so loose that by stepping on it you could tell it was loose? A. Yes, sir.

Mr. Blackwood:
Q. How long was this before the accident occurred?
A. Something like three or four days.
Q. Did you see it any more after you saw it the next morning after Tom was injured?
A. I never seen it no more. The next morning I went down through the yards and the piece had been removed.
Q. Wasn't on there at all? A. No, sir.

(Counsel for defendant objected to the latter part of the preceding answer and the foregoing question and answer as incompetent, irrelevant and immaterial to the issues in this cause. The court overruled said objection and the defendant saved its exceptions.)

Q. How long have you been switching for this company?
A. I have been in the service of the old company ever since 1888 up to the 19th of last March.
Q. What is the proper position of the head brakeman going into the yards at North Little Rock?
A. He is supposed to ride on the front end of the engine.
Q. What for?

A. To line up the switches and keep an engine from derailing by going out of an open switch, and to see that the track is clear.

Q. Where does he stand?

A. He is supposed to have a place to ride.

Q. Where is that? A. Have a foot-plate on the pilot.

Q. Is that the customary place for the head brakeman to ride? A. Yes, sir, that's the proper place.

58 Q. Were you in the habit of doing it?

A. Yes, sir, I always do it, I do it up till this day.

(Counsel for defendant objected to the above answer as incompetent, irrelevant and immaterial to the issues in this case. The Court overruled said objection and the defendant saved its exceptions.)

Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of? A. No, sir.

Q. Do you know of any rules against it?

A. I don't know of any rule to prevent a man from riding on there when they instruct him to ride on there.

Q. Did you see this man soon after he was injured?

A. Yes, sir.

Q. Did you see him after that night?

A. I never seen him again for three months.

Q. You don't know how long he was sick? A. No, sir.

Q. Did you see the condition of those cross-ties at the time this accident occurred? A. Yes, sir.

Q. What was the condition of them?

A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in—none of the yard at all was filled in.

Q. If it had been filled in between the cross-ties, how far would the pilot be from the surface of the ground?

A. It would be something like three inches, three or maybe four inches.

Cross-Examination.

Q. Do you profess to know what the rules of this company are? A. The Choctaw?

59 Q. Yes, sir.

A. No, sir, I don't profess to know the Choctaw rules.

Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir, that's the instructions from the conductors.

Q. Did you ever see a book of rules?

A. Yes, sir, I have seen some books of rules.

Q. I wish you would point me out a rule that requires them to ride on the front end of an engine. Did you ever see a rule of that kind?

A. Yes, sir, I have seen that book of rules, but I never read them.

Q. Is it not a fact that there is a rule which prohibits employes from stepping up on the front end of an engine as it approaches them?

A. There is a rule which prohibits them from stepping up on the front end of an engine when it is going at a high rate of speed.

Q. Please read rule No. 202 from the general rules and regulations of the operating department of the Choctaw, Oklahoma and Gulf Railroad, November 11th, 1898.

A. We weren't using them.

Q. Don't you know that they were using these rules?

A. They weren't at that time.

Q. What rules were they using?

A. We were working under the standard rules.

Q. Are these the standard rules? (Referring to book of rules set out above.)

A. Yes, sir, those are the standard rules all right.

Q. If you were working under the standard rules and these are the standard rules, you were working under these rules weren't you?

60 A. Well, what's that you want me to read?

Q. Read the rule.

Court: You were asked to state whether it was not against the rules of the Choctaw Company for any brakeman to ride on that step there when the engine was approaching, except when they are attaching the engine to cars, or coupling.

A. I am satisfied I never had any instructions not to ride on the front end of the engine coming in on a track. I always had instructions to ride there.

Court: How did you get that instruction? Did you get it from the book of rules?

A. I got it from the conductors.

Court: Not from the rule book?

A. I don't say I could find it in the rule book.

Court: Did you ever see it in the rule book? Did you ever see a rule book? A. Yes, sir, I have seen rule books.

Court: Did you ever notice in there what the rule is?

A. Well, I don't remember just exactly what the rule is.

Mr. Peirce:

Q. Read rule 202.

(Witness read rule as follows: "Employes are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices.").

Q. You say these were new yards?

A. Yes, sir, they were new yards.

Q. You were working for the road at the time Tom Tennessee was? A. Yes, sir.

Q. How many times were you in those yards?

A. Come in twice a week, and had to go out twice a week.

61 Q. Tennessee was performing a similar service on other trains, wasn't he? A. Yes, sir,

Q. Was he on a regular run? A. Yes, sir.

Q. Tennessee would be coming in as you went out, would he?

A. Yes sir, and sometimes we would both go out the same day.

Q. You were coming in and going out of the new yards?

A. Yes, sir.

Q. Did you know about how those yards were constructed over there? A. Yes, sir, pretty well.

Q. You could see it, couldn't you from coming in and going out? A. Yes, sir, you could see the yard.

Q. It was perfectly apparent to the eye, wasn't it? In other words, you could see that these ties were not filled in, couldn't you?

A. Yes, sir, you could see that the ties were not filled in.

Q. Wasn't this a new yard that was put in after the Choctaw bought the road from the old company? A. Yes, sir.

Q. They were doing considerable work, weren't they?

A. Yes, sir, they were putting in new yards.

Q. Making an entire change, weren't they? A. Yes, sir.

Q. Making a new line almost? A. Yes, sir.

Q. Enlarging their terminal facilities? A. Yes, sir.

Q. They were making extensive repairs? A. Yes, sir.

Q. Working on all the old bridges?

A. No, sir, not all of them.

Q. A great many of them? A. Yes, sir.

62 Q. They were raising the dumps?

A. They were working on the dumps, but they weren't raising them except over there in the bottoms. In a great many places they were widening the dumps.

Q. They have practically made a new road-bed out of it, haven't they?

A. Yes sir, I suppose so, I haven't been over it in a year.
Q. They were enlarging it in every way? A. Yes sir.
Q. They were working in almost every department of the road? A. Yes sir.
Q. Wasn't that new yard over there somewhat in a chaotic condition? A. Well, the tracks were all laid and in service.
Q. They were all new, weren't they? A. Yes sir.
Q. They were still working, weren't they?
A. Yes sir, they had quit work in the yards, and had the track laid, but not filled in.
Q. If you go along the lead track you can see all the new yard, can't you? A. Yes sir.
Q. When you go around that lead track you can get a pretty good view of the yards?
A. Well, if there are cars standing on the track you can't see down the track.
Q. After you get down in the lead track you can see the condition? A. Yes sir.
Q. If you are sitting up on the front end of the engine, you can see the condition of the lead track, can't you?
A. Only for a certain distance.
Q. As you go out, you can see the condition of it?
A. Yes sir.

63 Redirect Examination.

Q. You say you had been working for this company how long?
A. Ever since the 23rd day of December, 1888.
Q. You worked for this company right along since that time? A. Yes sir.
Q. Up to what time?
A. Up to the 18th of March, I believe.
Q. You know what the custom was about these brakemen riding into yards? A. Yes sir.
Q. What was that custom?
A. It's the custom to ride on the front end of the engine and line up the switches.
Q. Was that the custom after the Choctaw and Memphis was bought by the Choctaw, Oklahoma and Gulf Ry.?
A. Yes sir.
Q. Do you know whether these rules, these printed rules, were generally distributed to brakemen, or not?
A. In February or March when these rules were sent down they only got a small supply and they were only issued to the conductors and engineers and the brakemen didn't have any of them in their possession.
Q. Did you ever have one of these books? A. No sir.
Q. You never owned one? A. No sir.

Q. Where did you see them?

A. I seen them with the conductors, I only saw two or three of them. I never did see a brakeman with one.

Q. What would be a safe condition for a track in a yard?

A. Well, a safe condition for a track in a yard is for the track in the center to be filled, and on the outside of the ties and in between the rails, and blocks of timber in between the frogs.

Q. You mean these spaces in between the ties are filled?

A. In the yard they are supposed to be filled up level
64 with the top.

Q. Do you know when they first began to use these new yards?

A. Well, no sir, not exactly, I think it was before Christmas, a little before Christmas.

Cross-Examination.

Q. You are a brother of Hilliard Graves? A. Yes sir.

Thomas Tennessee, plaintiff, being recalled, testified
65 as follows:

Direct Examination.

Q. Did you ever have any of those printed rules, like that book? A. No sir, I never saw one until after I got hurt.

Q. You never got any printed rules of this company?

A. No sir.

Q. What was the number of the engine you say you were on? A. C. O. & G. engine No. 5.

Q. Do you know what make it was? A. Rhode Island.

Cross-Examination.

Q. You know that all railroads generally have rules?

A. Yes sir, all the railroads I ever worked for in my life furnished me with a copy of the rules before I went out.

Q. You know then as a general rule railroads have rules?

A. Yes sir.

Redirect Examination.

Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of the engine into a yard?

A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

Q. What do you mean by getting days?

A. They would pull me off from my work and lay me off 10 or 15 days.

Q. Trying to punish you for not riding on the front end?

A. Yes sir.

Recross-Examination.

Q. You stated just now that it was your business to ride on the front end of the engine by the rules on other roads. Now what about rules on other roads in reference to stepping on an engine moving towards you?

66 A. I think it states the right speed for a man to catch the engine.

Q. Do you remember what it is.

A. No sir, I do not.

(Plaintiff introduces Carlisle's Tables in evidence showing that the plaintiff's expectancy is 23.9 years.)

Plaintiff rests.

67 Whereupon, the defendant, to sustain its defense, introduced the following testimony, to-wit:

R. A. Vaughan, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. Mr. Vaughan, where do you live now?

A. Fayetteville, Arkansas.

Q. Where were you at or about the time Tennessee was hurt on the 6th of February, 1900?

A. I was living at Little Rock.

Q. By whom were you employed?

A. In the Legal Department of the Choctaw Railroad.

Q. Did you have any talk with Tennessee about this accident after it occurred? A. Yes, sir.

Q. He stated here on the stand a while ago that he told you after the accident occurred that he attempted to get on the step, the step gave way and he fell, I will ask you if he ever made any such statement to you? A. No, sir.

Cross-Examination.

Q. How come you to go over there?

A. Well, we investigated all injuries and I will explain another reason why I went. He had some garnishment cases against him, and I think there was a little balance due him and I went over to ask him about that.

Q. Where did you see him? A. At the hospital.

Q. Do you recollect the date? A. No, sir, I do not.

Q. Did you ever take a written statement from him?

A. Yes, sir.

Q. Where is that written statement?

68 A. I think it is among those papers.

Q. Did he say anything about the step at all?

A. Said that he slipped off the step, that his foot slipped is my remembrance of it. I wrote it down in the statement.

Q. He says, (reads the statement) "I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch, the head-light blinded me, I attempted to get on the pilot and the train was going three or four miles an hour, and my left foot slipped and I fell between the pilot and the rails." Did he go into particulars about how he slipped?

A. That statement is as much as I remember about it.

Q. Have you seen this statement to-day?

A. I glanced over it.

Q. Couldn't he have told you that the step gave way?

A. If he had, I think I would have put it in.

Q. You didn't put down what he said word for word did you? A. No, sir, not verbatim.

Q. You don't pretend to have used his own words, his own language? A. I think so, substantially.

Q. How many people were there?

A. Well, I don't remember, I think perhaps no one except myself.

Q. Why did you take his statement down?

A. That's the custom in investigating all injuries.

Q. You were taking it down to be used in case he brought suit? A. We wanted the facts.

Q. Do you know how long he had been at the hospital?

A. No, sir, I do not. I remember that at the time of the injury a report was made of his injury.

Q. It was a few days after, wasn't it?

A. I don't remember, I think it was sometime after, perhaps a month or six weeks. He was sitting up when I went there.

Q. He was then in the hospital? A. Yes, sir.

69 Redirect Examination.

Q. This statement is here? A. Yes, sir.

Counsel for defendant read statement to the jury as follows:

"My name is Tom Tennessee. I was brakeman on Train No. 13, Engine No. 5, west bound on Feby. 6, 1900, about 10 o'clock P. M. as we entered the yards at Argenta. I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch the

head-light blinded me. I jumped on the pilot as the train was running 3 or 4 miles an hour and my left foot slipped and fell between the pilot and the rail, which threw me off of the pilot in front of the engine between the rails. I rolled my body and right leg out of the track, but my left leg was caught and cut off just above the knee. I was not injured otherwise. The engine, after the first wheel hit my leg, made a good stop. I hallooed before that but don't know whether he heard me. I don't think that he saw me or heard me either. At the time I was hurt it was raining and the pilot was slick. I have been braking 15 or 16 years and have been hurt three other times in the service. I was on the engineer's side when I attempted to get on the pilot. Nobody saw the accident."

(Signed) TOM TENNESSEE.

70 Thomas Cuneo, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Tom Cuneo.

Q. Where do you live? A. Over in Argenta.

Q. What business were you engaged in on the 6th of February last year?

A. I was running an engine for the Choctaw, Oklahoma and Gulf.

Q. Are you still in the employ of the company?

A. No, sir.

Q. How long has it been since you were in the employ of the company? A. The 25th of last November.

Q. Mr. Cuneo, do you remember the night Tom Tennessee had his leg cut off? A. Yes, sir.

Q. Just begin now in your own way, and clearly and explicitly as posssible explain to the jury how it happened.

A. We come into Argenta and stopped on the main line and he threw the switch for the yard, then he went over on the second track and threw the third switch and gave his signal to come ahead. When I come up to him he made to get on the little step on the pilot and it was raining and slippery and he slipped off and the wheel ran over his leg. I couldn't see him at the time he slipped on account of the front end of the engine. It was raining and slippery and he hallooed and I stopped.

Q. Did you have any talk with him immediately after it happened?

A. No, sir, he didn't say nothing to me at all. I got down and looked at him and he said the wheel run over his leg, that's all.

Q. Did he say whether he slipped off or not?

A. Didn't say nothing of the kind at all.

Q. As you approached him did you see him?

A. Yes, sir, he was right down beside the engine.

71 Q. I mean before he was struck? A. Yes sir.

Q. Where was he standing?

A. He was standing just in the clear of the track on the side of the track, and when we got up to him he made a step to get on this step, of the pilot.

Q. Just describe that step on the pilot to the jury?

A. It's about 18 to 20 inches long and 4 or 6 inches wide. It is made rough to keep a man's foot from slipping off of it.

Q. What position did Tennessee occupy on that train?

A. He was head-brakeman.

Q. When he came into the yards what was his duty?

A. His duty was to throw the switches for the engine to head into the yard.

Q. What sort of pilot did that engine have?

A. A pilot like any other engine; a long pilot.

Q. Is there any difference in pilots on engines?

A. Yes sir, some are not as long as others.

Q. This was one of the long kind? A. Yes sir.

Q. How fast were you running?

A. Not over four miles an hour.

Q. How far did you run from the point where he fell?

A. Not over ten feet, he was laying opposite the third drive-wheel when we stopped.

Q. You stopped as quickly as possible after you heard him halloo? A. Yes sir.

Q. Mr. Cuneo, I will ask you what that step was put on that engine for?

A. It is put there to make couplings ahead, pilot-bar couplings.

Q. Just explain to the jury what you mean by pilot-bar couplings.

A. There is a bar that runs out of the end of the pilot. You raise it up so as to extend far enough to keep the pilot from striking the box car. You get on that step to make the coupling.

72 Q. Is it put there for any other purpose?

A. No sir.

Q. I will ask you if Tennessee had any business stepping on that step at the time he fell?

A. No sir, not until we got into the clear which would have been about twenty car lengths, and cut the engine off.

Q. At the time he fell, I will ask you if he had any business for which that step was constructed to step on that step?

A. No sir, there weren't any cars on the track at all.

Q. Then the only purpose is for a man to make a pilot-bar coupling? To step on it and stand while he raises the bar

and puts it into the draw-head of the car he is going to couple to? A. Yes sir.

Q. What was his next duty at that time? If he had not fallen and been injured, what would have been his next duty?

A. When we got into the clear he would have to cut the engine off from the train.

Q. If that was the case, where should he have stepped up after lining up the last switch?

A. He could have got on the step on the back of the tank or on the ladder of the first box-car.

Q. And rides down into the yard until you get into the clear, and then what does he do?

A. Cut the engine off, pull the pin or uncouple the coupler.

Q. Then when he attempted to step on the front of that engine that night, instead of stepping there on the front of the pilot he should have taken his place at the back end of the engine, should he? A. Yes sir.

Court: What was his duty after he had made that third switch?

A. After we got the train in the clear he should have cut the engine off and taken it into the round-house.

Court: Was the train to stop there immediately after it got on that switch? A. Certainly.

73 Court: How was he to get on the train in order to do that?

A. There are ladders on the box cars and a step on the back end of the tank.

Court: Then instead of getting in front of the engine, his duty was to get on the tank? A. Yes sir.

Court: Was he to get on at the place he did, or was he to walk on further?

A. He was supposed to get on where he did only behind the engine.

Mr. Peirce:

Q. Mr. Cuneo, when a man does get on that step for the purpose of making a pilot-bar coupling, is he supposed to get on when the train is in motion or at a standstill?

A. If he wants the engineer to stop he is supposed to give him a signal to stop.

Q. He has the power to do that?

A. Yes sir. He doesn't have to get on while the train is moving unless he wants to.

Q. That night, if he had signalled you, you would have had to stop and would have stopped? A. Yes sir.

Q. I will ask you if there are any other steps on engines, on freight engines, on the back end of the engines?

A. Yes sir, there is a big step about 8 inches wide.

Q. And how long? A. About 8 feet long.

Q. Made of heavy board? A. Yes sir, two-inch board.
Q. Are there any hand-holds on it?
A. Yes sir, they always have hand-holds.
74 Q. Now, this little step on the front end of engines, is there any hand-holds on it? A. Yes sir.
Q. Whereabouts is it? A. Right on top of the pilot.
Q. How do you reach it? A. A man can reach that far.
Q. But he has to lean over, doesn't he?
A. Yes sir, you can't see him sitting in the engine until he gets up.
Q. When he goes to step up on the front end of that pilot and put his foot on that step, he would be sort of leaning over to reach that hold on the top of it? A. Yes sir.
Q. Mr. Cuneo, how long have you known Tom Tennessee?
A. I don't know, he made two or three trips with me, two trips that I know of.
Q. In coming in and going out, where do you go from and come to, what part of the yards?
A. What part of the yards?
Q. You don't go on the same track every time do you?
A. Went in on which ever one was clear.
Q. You went into the new yards? A. Yes sir.
Q. Did you know the condition of these yards? A. Yes, sir.
Q. Was it perfectly patent and apparent to the eye, the condition of the tracks and the ties?
A. Certainly.
Q. Anybody could see, if they ran in there? A. Yes sir.
Q. You made two trips with Tennessee? A. Yes sir.
75 Q. Did you go out in the day or at night?
A. I don't remember.
Q. Do you remember what time you left when you went out on that trip?
A. I left here about 7 o'clock, or maybe 6:55, it was daylight.
Q. Did you leave from the new yards? A. Yes sir.
Q. When you started back—you were the engineer on that trip—where did you start from on your return trip?
A. From Hopefield, just across the river from Memphis.
Q. Did you inspect your engine before you left?
A. Yes sir.
Q. Was that your business? A. Yes sir.
Q. Did you make a careful inspection? A. Yes sir.
Q. What was the condition of the step then?
A. It was all right.
Q. Did you inspect the step when you got in that night?
A. Yes sir.
Q. After the accident? A. Yes sir.
Q. What was the condition of it then?

A. It was all right.

Q. After you had cut the engine off, and looked at the step it was all solid, was it? A. Yes sir.

Q. Had you seen Tennessee on that step before on that day?

A. Yes sir, he got on it at Forrest City going about 12 miles an hour. A brakeman standing there halloed at him and said, "What are you trying to do, get killed?" He rode about two or three car lengths on it that time.

Q. I will ask you if it is not a dangerous thing to step on that little iron step when the engine is in motion? Is it apparently dangerous for a man to step on that little step when the
76 train is in motion? A. Yes sir.

Q. How would you consider it that night?

A. It was very dangerous, it was wet and slippery.

Q. Was it very dangerous under the circumstances that night? A. Yes sir.

Q. He had no duty to perform that required him to step on that step at that time? A. No sir.

Q. When you went out on that trip did you make an inspection of your engine? A. Yes sir.

Q. And the step was all right then, was it? A. Yes sir.

Q. And when you returned you made an inspection of your engine at Hopefield and the step was all right? A. Yes sir.

Q. How are those tracks in those new yards situated with reference to the old main line of the Little Rock and Memphis Railroad? How near to it are they. Do they all run down together?

A. No sir, they go close to the old yard, one track leads from one over to the other, but they don't run together.

Q. When you get on the old main line of the Memphis and Little Rock road and go down that line to the lower end of the yard, as you come in is it not a fact that the new yards are in plain view? A. Yes sir, the new yard is in plain view.

Q. How far is it? A. From the old yard?

Q. As you go down about where the new depot is and near where Tennessee got hurt, how far is that from the old track of the Memphis and Little Rock road?

A. It is about 75 yards, I suppose.

Q. What is there in between?

A. Other tracks and the coal chute.

Q. The coal chute is at one point?
77 A. Yes sir.

Q. The coal chute doesn't run all the way up and down? A. No sir, it is not opposite where he got hurt.

Q. What is there between the main line of the old track and the track where he got hurt?

A. There are about three other tracks between that and out main line.

Q. Are those tracks in the new yard? A. Yes sir.

Q. About that time what changes or improvements was the Choctaw, Oklahoma and Gulf making in the old arrangements over there?

A. They had built a new yard over there with eight tracks to it.

Q. Right before this accident occurred what changes had they made there or what additions?

A. They were working in there.

Q. Putting in those new yards?

A. It was all in at that time.

Q. Were they working on it at that time? A. No sir.

Q. The yards had been put in? A. Yes sir.

Q. How long before that had they been put in?

A. I don't know.

Q. Was it a short time or long time?

A. About six or eight months, I guess.

Q. When did the Choctaw Company take charge, the first of November, didn't they?

A. They took charge the 10th of December and this was in February.

Q. Then it wasn't very long before, was it? A. No sir.

78 Cross-Examination.

Q. They had been at work in the summer, hadn't they? A. They put it in there the fall before.

Q. They had quit work some two or three months before this man was hurt, hadn't they? A. Yes sir.

Q. They had been using it how long?

A. They had been using it ever since it was finished.

Q. They had been using it some two or three months before this man was hurt? A. Yes sir.

Q. How long had you been at work for the company at the time this accident occurred? A. For the Choctaw Company?

Q. Yes sir. A. From the May before to February.

Q. You say you made two or three trips out of the yard with this man Tennessee? A. Yes sir.

Q. When did you make those trips?

A. I couldn't tell you the dates.

Q. Do you know whether it was just preceding the accident or a month or two before?

A. Well, he went out with me the same trip going that way.

Q. Was that the first trip he had made? Hadn't he laid off in January?

A. No sir. He made another trip, but I couldn't say when it was.

Q. He laid off during January with a sore toe, didn't he?

A. I don't remember.
Q. Was that other trip before or after January?
A. I don't remember when it was. I know that there was one trip before this one.
Q. When you came up to him that night, you saw him plainly, didn't you? A. Yes sir.
79 Q. Did you run him down? A. No, sir.
Q. You saw him, didn't you?
A. I did, standing still.
Q. You didn't attempt to run over him?
A. Certainly not.
Q. You didn't think he was in any danger did you?
A. No, sir.
Q. You were running very slowly weren't you?
A. Yes, sir.
Q. In railroad language when you speak of a high rate of speed were you running at a hight rate then?
A. No, sir, very slow.
Q. It is customary for a brakeman to swing on to the engine when they are running at a slow speed, isn't it?
A. Yes, sir.
Q. There is no apparent danger, is there?
A. Yes, sir, there is in front, there is always danger there.
Q. Did you ever see brakemen jump on this step before?
A. Yes, sir.
Q. Is it customary?
A. Yes, sir, when they make pilot-bar couplings.
Q. Is it customary when they ride up to line up the switches? A. They seldom ever get on there.
Q. They do do it sometimes, don't they?
A. Sometimes, yes, sir.
Q. You didn't think that there was anything unusual seeing him standing there? A. No, sir.
Q. Did you think that there was anything very unusual in seeing him trying to get on there?
A. He was standing in the clear and I was in the engine looking at him. He just took a step right over and stepped on this little step.
80 Q. You mean he was standing on the outside of the railroad irons or rails? A. Yes, sir.
Q. And when the pilot came opposite him he made a step to get on this little step? A. Yes, sir.
Q. You couldn't see whether he made it or not?
A. No, sir, you couldn't see that.
Q. You couldn't see him? A. No, sir.
Q. Did you know he fell?
A. No, sir, not until he hallooed.
Q. Did you have any conversation with him right away?

A. No, sir.
Q. How long did you stay there with him, or did you stay there at all? A. Not over two minutes.
Q. You just left him there? A. Yes, sir.
Q. He was lying on the ground when [he] left?
A. Yes, sir.
Q. Lying on the ends of the ties? A. Yes, sir.
Q. When you inspected this step—you say you inspected it at Hopefield? A. Yes, sir.
Q. Had you ever inspected this step before?
A. Yes, sir.
Q. How often?
A. Every time I looked around the engine.
Q. How often did you run that engine out—was that your regular engine?
A. No, sir. We didn't have any regular eng'
81 Q. They put you on whatever engines they wanted to send you out on? A. Yes, sir.
Q. How many times had you been on this engine previous to this trip?
A. I had been on it nearly thirty days, on that one engine.
Q. Was it anybody else's duty to inspect that engine?
A. They have an inspector at the shop.
Q. At what shop? A. The Choctaw shop.
Q. Here at Argenta? A. Yes, sir.
Q. Do they have any inspector at Hopefield besides the engineer? A. No, sir.
Q. Who is the inspector over there at the shop?
A. I don't know him. I am not working over there.
Q. You say Tennessee had gotten on this particular step at Forrest City, coming back this way? A. Yes, sir.
Q. And somebody hallooed at him not to do it and asked him if he was crazy?
A. Somebody asked him if he wanted to get killed.
Q. Who was that? A. I don't know.
Q. How can you recollect that?
A. It kind of frightened me, I thought I was going to kill him.
Q. When did you report that to the company?
A. Put it down on the statement when I got in?
Q. You sent in a written statement? A. Yes, sir.
Q. Did anyone call for it?
A. It is customary to send in a statement when anything happens.
Q. Did you put that in your written statement?
A. Yes, sir.
Q. About what was done at Forrest City?

A. I don't know. I couldn't say, I haven't seen the statement.

Q. The statement that you made when the accident
82 occurred, did you say anything about the incident at Forrest City?

A. Yes, sir, I think it is on there. No, sir, I see now that it is not.

Q. Then you didn't make any statement when everything was fresh in your mind?

A. Made that statement, yes, sir.

Q. That statement was made by the company, wasn't it?

A. Yes, sir.

Q. When did you sign it, just the other day?

A. No, sir.

Q. Mr. Cuneo, is it not a fact that if a brakeman would jump on that cow catcher and not get injured it wouldn't excite any railroad man's attention whatever?

A. I don't know that it would excite every man.

Q. Is it not a fact that a railroad man would pay no attention to it? A. I paid attention to it.

Q. If the train was running at a slow rate of speed that you have described?

A. At Forrest City the train was running at least 12 miles an hour, that's pretty fast.

Q. Over here? A. That was very slow.

Q. Jumping on at that speed wouldn't have attracted any special attention if he had not gotten hurt? A. No, sir.

Q. How long had you been an engineer?

A. About thirteen months.

Q. What are you doing now? A. Nothing.

Q. Will you swear that there is a step on this particular engine in the rear? A. Yes, sir.

Q. When have you seen that engine?

A. Oh! no, not now, certainly not. That engine has not been down here since last summer.

83 Q. Where is that engine?

A. On the west end somewhere.

Q. Do you know how old that engine was? A. No, sir.

Q. Don't you know that that engine had no rear step at all?

A. I don't know, all of those engines have steps on the back.

Q. Is it not a fact that this engine didn't ever have any?

A. All freight engines have got them.

Q. Was that a freight engine at that time? A. Yes, sir.

Q. Wasn't it a passenger engine?

A. It was a freight when it was brought down here.

Q. Was it built for a freight engine?

A. It was built for a passenger engine.

Q. You say that when you go around into that new yard around this lead track, that it is about 75 yards across to the place where this man got hurt?

A. Yes, sir, about 75 yards from there across to the main line.

Q. And there are three tracks in between there?

A. Yes, sir.

Q. If those three tracks had cars on them you couldn't tell the condition of the track where he got hurt, could you?

A. Couldn't tell it from the main line, no, sir.

Q. In getting on that particular part of the pilot that night when he was hurt, was this man in the line of his duty?

A. I don't think he was, no, sir.

Q. Didn't you tell Mr. House and me in the presence of this man to-day that he was in the line of his duty?

A. Yes, sir, I did.

Q. Why do you say different now?

A. Well, that engine had to be cut off from there before you could take it out.

Q. Then was he in the line of his duty? A. No, sir.

84 Redirect Examination.

Q. What sort of a light did you have?

A. An electric headlight.

Q. How great an area do those lights light up?

A. Well, you could see over a hundred yards with it pretty plain?

Q. As you approached Tennessee that night you could see him in the light of the head-light? A. Yes, sir.

Q. Was that light so plain that a man could see the condition of the road-bed and cross-ties and the construction of the track?

A. No, sir, I should think that it would have blinded him.

Q. Of course, if you were standing right up looking at the light, it would blind you, wouldn't it? A. Yes, sir.

Q. But out in front where it lights up the yard so that a man can see perfectly, he could see whether these ties were filled in or not and all about the construction of the yard, couldn't he? A. Yes, sir.

Q. This light that night lit up this particular place where Tennessee was standing, didn't it?

A. Yes, sir, lit up the whole place, lit up the whole yard as we went in there.

Q. While he was standing there waiting?

A. It lit up the whole yard, yes, sir.

Recross-Examination.

Q. I see that in this statement which you made you say, "We were coming into the yards at Argenta. He was brakeman. He threw the first switch and then rode to the second switch." Where did he ride?

A. Rode to the second switch and got off and went to the third switch.

85 Q. Where on the engine was he riding?

A. He was riding on the front step.

Q. Then he had ridden from the first switch to the third switch? A. Yes, sir.

Q. And he had ridden on the very same place that you say he attempted to get on at the time of the injury?

A. No, sir, he hadn't rode quite that far, he rode to the second switch.

Q. You stated a while ago that the main line of the old Memphis and Little Rock road going down the old Memphis track was about 75 yards from the new yards?

A. No, sir, from this switch, this side track, where he got hurt.

Q. If a man is going out on the old line from the old yards in the direction of Memphis, he would be about 75 yards from the point where he got hurt?

A. If he was on the main line, he would, yes, sir.

86 A. M. McAvoy, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. A. M. McAvoy.

Q. What position do you occupy, Mr. McAvoy?

A I am roadmaster of the Choctaw Road in the Memphis Division.

Q. How long have you been at work for this road?

A. Twenty-four years next October.

Q. Were you in the railroad business before that time?

A. Yes, sir.

87 Q. How much experience have you had as a railroad man?

A. During my life, I have put in about thirty years.

Q. What are your duties as roadmaster?

A. My duty is to see that the tracks are kept up and maintained all along the line.

Q. Do you remember when this new yard was put in at Argenta? A. Yes sir.

Q. When was it? A. In 1899.

Q. What time?

A. During the months of October, November and December, it was completed in December.

Q. Were those yards put in there in the usual way?

A. Yes sir.

Q. Were they completed in the usual time? A. Yes sir.

Q. Were these tracks put in under your supervision?

A. Yes sir.

Q. Was there any unnecessary delay in putting in those tracks?

A. No sir, we had the yard completed before we opened the road.

Q. Did you have that yard in such condition as is customary with roads that are just opening up and making improvements in their line? A. Yes sir.

Q. Considering the age of the road, considering the character of the improvements, considering the amount of work to be done, and considering all the surrounding circumstances, were those yards in the usual condition that yards are on other roads that are constructed at that period of the road's existence? A. Yes sir.

Q. I mean at the time of the accident to Tennessee, which was about February 6th, 1900? A. Yes sir.

Cross-Examination.

Mr. Blackwood:

88 Q. How much of the time did you spend in Argenta in January and February?

A. I didn't spend much time. I was all over the line, sometimes once a week and sometimes twice a week.

Q. Where was your headquarters? A. Brinkley.

Q. How often were you in Argenta in January?

A. I couldn't say.

Q. More than once? A. I couldn't say how many times.

Q. Were you there in January at all?

A. I couldn't say, but I expect I was.

Q. Don't you have any way of telling.

A. No sir, I keep no record telling where I am. I am there off and on from time to time.

Q. How often on an average have you been in Argenta?

A. As I say once or twice a week, sometimes not so often.

Q. Do you call a yard complete when the dirt is not filled in between the ties? A. Well, yes sir.

Q. Would you consider a yard complete, a yard like this, where the spaces between the ties were not filled in with cinders or gravel?

A. Yes sir, lots of places. It's all owing to the circumstances of the place at work on, the circumstances of the place

—of construction and the kind of material to be used. Some places we have to leave so in order to permit drainage.

Q. Do you consider a yard complete where the spaces between the ties are not filled in with dirt, or cinders or gravel?

A. Well, we filled in between the track and we did not fill in between the ties. We hauled dirt and filled in between the tracks last September and October.

Q. I will ask you this question—Do you consider a yard complete if the spaces between the ties are not filled in?

A. I do under certain circumstances. That's where
89 the yard requires drainage and where they cannot fill in over the top of the ties. They have to keep it exposed to let the water drain out. It was necessary for that to be done.

Q. Had it been filled in since?

A. We filled it in last September and October.

Q. Is it now level with the top of the ties?

A. In some places it is, and in some places it is not.

Q. That was your intention, to make it level with the top?

A. Something like that.

Q. Was it filled in between the ties in December, 1900?

A. Yes sir, between the ties, that is in the middle of the track it was, but not on the outside of the ties all the way across. It is what we call surfacing the track to fill in the center between the tracks. The yard was not level.

Q. You mean between the rails?

A. No, I mean between the tracks. There are eight tracks there, and we filled in between the tracks.

Q. Did you fill in between the rails on all of these tracks?

A. I wouldn't say all of them. We surfaced the yard and filled it in the best we could with the material we had. In order to surface the yard, we filled in between the tracks and put it in as good condition as we could, and after the yards were settled we hauled dirt and filled in.

Q. On all of these tracks?

A. I think so, I wouldn't be positive.

Q. In order to surface the yard, you dug in between the tracks and threw dirt in?

A. I said we hauled dirt there and threw in.

Q. Was anything done to it after you completed it in December until this man was injured on the 6th of February?

A. Not until last summer.

Court: Was that usual?

A. Yes sir, on all new yards it was, where the yards have to settle and get a foundation.

90 Mr. Peirce:

Q. Was it necessary in this case?

A. Yes sir, I think so.

Mr. Blackwood:

Q. Wouldn't it make it all the more substantial if you had filled in between the ties with cinders and dirt?

A. No sir, it would go down in mud. It wouldn't drain.

Q. Wouldn't that make it a more substantial track?

A. Yes sir, after it became settled.

Q. I would like you to explain to what extent the dirt was put in between the rails in December when you quit work.

A. Just enough to make drainage. We surfaced the track and filled in within an inch or an inch and a half from the top of the ties in the middle of the track, so the water would run off into the ditches between the tracks.

Q. That's between the rails?

A. No, between the tracks, we filled in between the rails something like that (indicating an oval shape with his hands) in order to shed the water.

Q. To what extent was that done in the yards over there?

A. We put in what we call a general surfacing. In a yard like that it has to be gone over for six or seven months or probably a year before it is thoroughly settled.

Court: Was as much of that done as was practicable?

A. At that time, yes sir.

Judge House:

Q. In December, at the time you say the yard was completed, what proportion of the track had you filled up between the rails?

A. As I said before we would fill in the middle—

Q. I don't ask you that, I ask you if you filled in a part of the switches or all of them? A. All of them.

Q. In December, at the time the yard was completed, in between the rails the dirt was put in between the ties?

91 A. That is, the dirt was thrown in the center and sloped down to the ends.

Q. How far did it slope?

A. Clear to the bottom of the rails.

Q. How near to the rails?

A. We would fill in the center, about a foot wide in the center, and slope down to the end of the ties which are about 8 feet long.

Q. Then you filled up level to the ties in the center and then it sloped towards the ends of the ties? A. Yes sir.

Q. That was all over the yard? A. Yes sir.

Redirect Examination.

Q. Considering the condition of the yard over there, did the work progress as fast as practicable to make a good yard?

A. Yes, sir.

Court: Is it usual for trains to be run over tracks in the condition that those tracks were?

A. Yes sir, that's the only way we have of settling them—using them.

Court: Do new roads usually use them?

A. Yes sir, we consider the yard complete and ready to be ballasted for whatever we feel like putting on it after it is settled?

A. M. McAvoy, being recalled, testified as follows:

Direct Examination.

Q. Mr. McAvoy, I will ask you to examine that blue print. What is that blue print?

A. Print of our new Argenta yard, in fact the whole yard over there.

Q. That's the Argenta yard? A. Yes sir.

Q. This track that is marked on there as the main
92 line, is that the main line as it exists at this time?

A. Yes sir, the second line.

Q. Now, this line that is marked "main line," is that at the present time the main track?

A. Yes sir, the old line turns off here to go to Little Rock.

Q. Where was the old main line of the Little Rock and Memphis track? A. Just on the same line.

Q. Mr. McAvoy, this line leading out to the right coming from Memphis as you leave the main line and belting the yards, so to speak, what do you call that?

A. The lead track.

Q. Does this map represent the condition of the track on the 6th of February, 1900?

A. Yes sir, it's the same print the yards were put in by.

Q. How far is the third switch, or the lead track, from the main line of the Little Rock and Memphis road, or the main line as it now exists?

A. I don't know exactly, I would judge it to be about 100 feet. The first tracks are about 75 or 80 feet apart.

Q. Now how far are these tracks apart?

A. Fourteen feet from center to center.

Q. That would make about 100 feet from the main line to the switch on the third track?

A. Yes sir. That is, direct across; not from the switch, but direct across.

Q. This map represents the yard at the time the accident occurred? A. Yes sir.

Q. On these several tracks I see the words "capacity 36 cars", "capacity 37 cars", etc. Explain to the jury what that means?

A. That means the number of cars that they will clear between the switches?

Q. How thick is a tie?

A. Why, our standard ties are 6x8. Six inches thick and 8 inches wide.

93 Q. What kind of switch ties are those?

A. They are the regular standard ties. There are a few new ties, but they are towards this end. They are 7x9.

(Here defendant introduced map in evidence.)

Q. Mr. McAvoy, one more question about this map. I notice that along the lead track the word "frog" appears there. What does that indicate the position of?

A. That is the frog that allows the wheel to pass from one track to another.

Q. Does that indicate the position of a part of the switch?

A. Yes sir, that's a part of the switch.

Q. That is where the switch is located?

A. Yes sir, that is the back part of it.

Q. That is the part of it that the other tracks lead off?

A. No sir, they lead off from the head-block. The frog is used in crossing one rail with another.

Q. How far apart are those switches?

A. The leads of those switches are about 48 feet apart. That is from the head-block to the frog. I don't know exactly what the distance is from the head-block to head-block, but it is all the way from 60 or 70 to 100 feet.

Q. Mr. McAvoy, at the time the Choctaw, Oklahoma and Gulf Railroad Company took charge of this road, did they out in any other yards? A. Yes sir.

Q. At different places? A. Yes sir.

Q. Were those yards used in the same condition as this yard was used in?

(Plaintiff objected to the above question and the Court sustained said objection and refused to permit the witness to answer the question, to which ruling of the Court the defendant at the same time saved its exceptions.)

The blue print referred to in the foregoing evidence of A. McAvoy is attached hereto as Exhibit "A".

95 Joe Meyers, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Joe Meyers.
Q. What are you doing? A. I am running an engine.
Q. What were you doing on the 6th of February, 1900?
A. I was firing an engine.
Q. Do you remember the night that Tom Tennesse got his leg cut off in the yards at Argenta? A. Yes sir.
Q. What position did you occupy that night?
A. I was fireman.
Q. On the same engine that caused the injury?
A. Yes sir.
Q. Just state to the jury over there how that accident happened?
A. As we were coming into Little Rock Tom Tennessee was sitting on the seat in the engine back of me and was nodding. I touched him on the arm and said "we are in Little Rock now." He gets up and gets his lantern and gets off the engine and throws the switch to the lead track. He throws the second switch and the switch to No. 3 and, as we come in on switch No 3 he steps kind of to the middle of the track and as the engine approached him he tried to get on the step of the pilot and I suppose missed it and fell.
Q. Did you see him immediately after the accident?
A. When I heard him halloo I got my torch and jumped down. He was about five or six feet from the track.
Q. What did he say as to how the accident happened?
A. He says he slipped off the step.
Q. When did he say that?
A. About ten minutes after it happened?
Q. Did you examine that step?

95a A. Next morning I went and drawed some supplies and on my way back I stepped on the step and went up on to the pilot and filled the lights on the front of the engine and come down the same way and stepped on the step coming down and it was perfectly tight at 8 o'clock the next morning.

Q. Was it the same engine? A. Yes, sir.
Q. Same step? A. Yes, sir.
Q. Now, as the train goes into the yard what is the duty of the man who occupies the position that Tennessee did on that train?
A. His duty is to head the engine in and take the train into the clear and cut the engine off and take it to the roundhouse.
Q. Did he perform that duty that night?

A. He was just heading into the switch.

Q. He had already lined up the last switch? A. Yes, sir.

Q. Everything in that respect was complete?

A. Yes, sir.

Q. You were just heading in on No. 3? A. Yes, sir.

Q. At the time of the injury? A. Yes, sir.

Q. After Tennessee had thrown that switch and the train was heading in, what was the position for him to take in the proper discharge of his duty and what was the next duty that he would be required to perform?

A. Cut the engine off from the train.

Q. What position was he expected to take to perform that duty?

A. To catch the first car behind the engine or the rear of engine so as to cut the engine off.

Q. What position should he take to cut the engine off?

A. He should get on the step.

Q. What step?

A. The step on the back end of the engine.

96 Q. What back there for?

A. When we got into the clear to cut the engine off from the cars and take the engine to the round-house.

Q. Then, on this night, if Tennessee had been in the proper discharge of his duty he would have taken his position at the back end of the engine? A. Yes, sir.

Q. How many cars did you have on that train?

A. I don't remember, but I think we had something in the neighborhood of twenty.

Q. Were there any cars standing on the track that you were heading in on? A. No, sir.

Q. Was there plenty of room for the train to clear?

A. Yes sir.

Q. Did the headlight shine down there so that this fact was perfectly apparent? A. Yes, sir.

Q. Mr. Meyers, what is that step put there for?

A. It is put there to couple and uncouple the engine.

Q. Is it put there for any other purpose?

A. No, sir, not to catch engines or anything like that.

Q. Is there any rule of the Choctaw Railroad, or was there any in existence at that time, which directed head-brakemen to step up on this little step? A. No, sir.

Q. Was there any rule on the subject at all?

A. Yes, sir, a rule in the book of rules which says they must not catch the front end of an engine as it approaches them.

Q. How many trips had you made with Tom Tennessee?

A. That's the first trip.

Q. You left the morning before the accident?

A. Yes, sir, about daylight.

97 Q. How many times had you been in and out of this yard?

A. I don't know, about twenty times I reckon.

Q. Was the condition of these yards perfectly apparent?

A. I don't remember just exactly.

Q. I ask you if the condition of the track was apparent?

A. Yes, sir.

Cross-Examination.

Mr. Blackwood:

Q. Did you ever have a book of rules? A. Yes, sir.

Q. Have you got it now?

A. I haven't got it with me.

Q. When did you first get that book?

A. I got it, I think, in December or January, 1900.

Q. Just before the accident? A. About two months.

Q. Where did these books come from?

A. Mr. Robins gave me my book, the master mechanic.

Q. You don't know where they came from prior to that?

A. They were printed by the Choctaw, Oklahoma and Gulf but I couldn't say what place.

Q. When was your attention called to this rule?

A. Well, it never has been called just exactly at any time, only reading the book.

Q. Weren't you shown the book yesterday? A. No, sir.

Q. By Mr. Kilpatrick? A. No sir.

Q. When did you read it last?

A. It has been two months.

Q. When did you see a book of rules last?

A. I seen my book of rules last Sunday.

Q. Did you see a book of rules yesterday? A. No, sir.

Q. Did you talk with the attorney about this case?

98 A. Yes, sir.

Q. When? A. Thursday, I think it was.

Q. Didn't he show you the book then? A. No, sir.

Q. You say you were engineer on the night of the accident? A. No, sir, I said I was fireman.

Q. You have been promoted since? A. Yes, sir.

Q. You are engineer now? A. Yes, sir.

Q. How long have you been an engineer?

A. About four months.

Q. Did you ever see the head switchman get on this little step when he was coming into the yards? A. Yes, sir.

Q. If there had been other switches to throw, it would have been nothing unusual for him to jump on to this step and ride to the other switch?

A. Well, if he had had to do other duty there.

Q. But you claim he had no other duty?

A. No, sir, his next duty was behind the engine.
Q. If he had had any other duty he ought to have been back on the step? A. Yes, sir.
Q. Did this engine have any step in the rear?
A. I think it did?
Q. Don't you know that it didn't? A. I couldn't say.
Q. It was an old passenger engine, wasn't it?
A. Yes, sir, I think it was.
Q. Is it not a fact that these passenger engines don't have any steps behind?
A. Not on passenger engines, but I think this engine had a step on it.
99 Q. You would not swear to that positively?
A. No, sir.
Q. How far in on switch No. 3 had your engine gone at the time this man was hurt?
A. It was about ten feet from the points.
Q. What were you doing?
A. I was shutting the lubricator off.
Q. Which side were you on?
A. I was on the left hand side.
Q. He was on the right side? A. Yes, sir.
Q. You could not see him? A No, sir.
Q. Did you hear his halloo? A. Yes, sir.
Q. Did you get down to see him? A Yes, sir.
Q. How long did you stay with him?
A. About five minutes.
Q. Then where did you go? A. I got back on my engine.
Q. Where then? A. Went to the round-house.
Q. How far away was the round-house?
A. About a thousand feet.
Q. He was lying on the ground that night? A. Yes, sir.
Q. You stayed with him about five minutes, that is all you saw of him? A. Yes, sir.
Q. He was in great pain, wasn't he?
A. Yes, sir, he was in pain.
Q. He didn't undertake to say exactly how he got hurt, did he?
A. He only said when they asked him that he slipped off the step.
100 Q. Did you make a report to the company in writing? A. I signed the engineer's report.
Q. Did he undertake to describe how he got hurt?
A. No, sir.
Q. You say you only made one trip with him, that was all?
A. We went out of there about day-light the day before.
Q. You went over to Memphis and doubled back?
A. Yes, sir.

Q. You didn't get any sleep, did you, on that one trip, except what you stole?

A. Yes, sir, we got sleep at Hopefield, I think four or five hours.

Q. Then you doubled right back? A. Yes, sir.

Q. On this trip, Tom was asleep in your cab until you got in and then you woke him up? A. On the seat box in the cab.

Q. Then he got down and threw the switch to the head track and walked up to the third switch? A. Yes, sir.

Q. Then he threw the third switch and attempted to jump on this step on the front end of the engine? A. Yes, sir.

Q. Then it was that his leg was cut off? A. Yes, sir.

Q. Do you know when that was?

A. In February, I think the 6th.

Q. You went back there the next morning, you say?

A. Yes, sir, to the engine.

Q. About 8 o'clock? A. Yes, sir, about 8 o'clock.

Q. The step was good and tight?

A. Yes, sir, good and tight.

101 R. W. Harris, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. R. W. Harris.

Q. Do you remember when Tom Tennessee got his leg cut off in February, 1900? A Yes, sir.

Q. You were there that night?

A. I was flagging on the caboose.

Q. The same train? A. Yes, sir.

Q. Did you see him after the accident occurred?

A I guess about five or ten minutes after.

Q. Just explain to the jury in a brief way how that accident happened.

A. Well, I don't know anything about how it happened because I wasn't there when he got hurt. I came on with the same crew, I was flagging and we headed into the yard. After we come through the switch I had to close the main line switch and just as I got off the caboose to close the switch I heard some one scream and they stopped. I heard him halloo and supposed the engine had caught somebody and they had to back off of him. I got down and threw the switch so if we had to back out we could go through the switch, and came back and told the conductor I heard some one halloo.

Q. You went down there, did you?

A. No, sir, I stayed on the caboose until they started up again. We pulled the caboose down right opposite him and I got off and looked at him.

Q. Mr Harris, you are conversant with the duties of a brakeman, are you? A. Yes, sir.

Q. Did you have a book of rules? A. Yes, sir.

102 Q. After Tennessee had thrown that third switch and headed in on the last track, where was his place and what was his next duty?

A. His duty was to be on top of the car where he could see the engineer so that when we got the train in the clear he could cut the engine off and take it to the round-house.

Q. Did you leave the train on that track? A. Yes, sir.

Q. Were there any cars in front of you? A No, sir.

Q. Is there any rule of the company that requires a head-brakeman to stand in front of the engine and attempt to step on that step as the engine approaches them? A. No, sir.

Q. What is the rule in that respect?

A. In case of doubt take the safe side and stop them, run no risks.

Q. If a brakeman has any duties to perform on that step, he has a right under the rules to stop the engine?

A. He can stop the train, yes sir.

Q. Until he gets on? A. Yes, sir.

Q. Do you know of that being done on the road?

A Yes, sir.

Q. It is done, is it? A. Yes, sir.

Q. Is it not regarded as dangerous by railroad men for a man to attempt to step on one of those small steps when the train is in motion? A. Yes, sir.

Q It is regarded as dangerous?

A. Yes, sir, it is dangerous. You must use signals and stop them.

Q. Now, on a night like that when it was dark and had been raining all day, would you regard it as any more dangerous?

A. It is dangerous any time, being slippery it would be more dangerous.

103 Cross-Examination.

Q. You are a brakeman now? A. Yes sir.

Q. On the same road? A. Yes sir.

Q. Been a brakeman ever since the 6th of February for that road?

A. I was flagging then. As soon as they put on white brakemen I went to braking on the first crew.

Q. How long after this accident?

A. I couldn't say, not very long, I don't think more than a month or two.

Q. After the accident? A. Yes sir.

Q. What had you been up to that time? A. A flagman.

Q. Did you ever brake?

A. I never had broke any then, I mean I never broke regular.

Q. You had never followed the business of braking?

A. Not until after this accident.

Q. When the train is moving very slowly, it is not dangerous to step on that step is it?

A. Yes sir, it is dangerous to step on that step any time unless you stop them. You can use signals and stop them.

Q. If the step is in good order and the train barely moving just along so it could stop in 8 or 10 feet, isn't it perfectly safe?

A. No sir, you are liable to slip off of it any time.

Q. You can get on it, but you are liable to slip off?

A. Yes sir.

Q. Is it not a fact that it is grooved to make it rough so you cannot slip off if it is in good condition?

A. You can slip off of it, you are liable to miss it.

Q. Are there not such grooves?

A. Yes sir, it is grooved that way.

104 Q. If it is in good order, there is not much likelihood of your foot's slipping, is there? A. Yes sir.

Q. Right there on that rough piece?

A. You are liable to get overbalanced if you don't slip.

Q. It is as wide as a man's foot, isn't it?

A. Yes sir.

Q. You have seen brakemen jump on it? A. Oh, yes.

Q. Now, if there had been another switch to throw down below there, it would have been his place to be on there, wouldn't it? A. No sir.

Q. If there had been another switch?

A. If there had been another switch he could get up at the gang way, or he could have stopped them and got on it there.

Q. Is it customary for the head brakeman to ride in front and throw the switches before taking the engine into the yards? A. No sir.

Q. Do you know what the customary way was at the time this accident occurred? You were not a brakeman, were you?

A. No sir, but I had a book of rules.

Q. Do you know what the actual custom was for brakemen to do before the 6th of February, at the time of this accident?

A. Yes sir.

Q. How do you know that?

A. I had a book of rules that told.

Q. You were not a brakeman, were you? A. No sir.

Q. You were a flagman? A. Yes sir.

Q. How do you know what the custom was?

A. I had the book of rules.

Q. That's all you know, the book of rules?
A. I know the book of rules, I know the custom of brakemen to go in there I could see them.
105 Q. Their duty was to jump on that back step and ride in there? A. Yes sir.
Q. Is that the rule?
A. It is something similar to that, yes sir.
Q. Is not the whole business of a brakeman a risk?
A. Well, yes, it is risky in one way, but in another way it is not risky.
Q. Is it not a dangerous business to follow?
A. Well, not if you work careful.
Q. And never go near a car?
A. Yes sir, you go near a car all right. Accidents will happen to anybody.

Redirect Examination.

[—] Mr. Harris, you were working with brakemen over there, weren't you? A. Yes sir.
Q. You were expecting to become a brakeman?
A. Yes sir.
Q. In order to become a brakeman what did you have to do?
A. I have to help the brakemen do the work. I was on a local and helped unload the local and helped do the switching.
Q. I mean preparatory to becoming a brakeman?
A. I don't quite understand.
Q. What did you have to do in the way of preparation?
A. Well, I had to help do the switching whenever we had to do any switching. I had to cut off the cars if there were any cars to be cut off and I would ride in and couple them up.
Q. Well, I mean in the way of learning what the duties of a brakeman are.
A. I had a book of rules to tell me what to do.
Q. You had been studying that book of rules, had you?
A. Yes sir, I had read them more or less.

106 Hilliard Graves (colored), being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What is your name? A. Hilliard Graves.
Q. Where do you live? A. Argenta.
Q. Do you know Tom Tennessee? A. Yes sir.
Q. Where were you on the night of the 6th of February, 1900? A. I was brakeman for the Choctaw.
Q. Do you remember when Tom Tennessee got his leg cut off? A. Yes sir.
Q. Where were you at the time?

A. I wasn't right there, but I got there directly after it was done.

Q. Were you on the same train? A. Yes sir.

Q. What was your position on that train?

A. I was swing-brakeman.

Q. How long was it after Tom got his leg cut off until you saw him?

A. It was not five minutes, about three minutes, the time I could go four car lengths.

Q. Did you have any talk with him about how it occurred?

A. Yes sir.

Q. What did he say was the cause of it?

A. He said he attempted to get on the foot-board of the pilot.

Q. Just tell all he said.

A. He said he tried to get on the foot-board of the pilot and fell.

Q. Did he say what was the cause of the fall?

A. He just said that night he was trying to get on the foot-board and fell.

Q. Did he say what caused him to fall? A. No sir.

107 Q. Did he tell you that at any time that night?

A. He told me that he was trying to get on the foot-board and fell.

Q. How long have you known Tennessee?

A. I have known him since 1893.

Q. How long had he been working for this road?

A. I think he went to work in December.

Q. Do you know how many trips he had made over the road?

A. That was the second trip with me. We went out together in December on the first No. 9 that went out. I [—] taken sick with the small-pox directly after that and went to the hospital. I didn't come back again till about the first of February, and then I left here with him on the night of February 5th.

Q. In December, when you went out, did you leave from the new yards? A. We come in here from Memphis.

Q. Did you come into the new yards?

A. Yes sir, come into the new yards.

Q. That was in December? A. Yes sir.

Q. What were they doing over there at that time?

A. They were putting in new tracks.

Q. Did you know that there was a new yard over there?

A. Yes sir, I lived right across from it.

Q. They were putting in new tracks? A. Yes sir.

Q. Did you know it from coming in on the trains or from living over there?

A. I knew it from living over by there. You see in December was the first trip I had been out since way up in the spring because I had been sick with rheumatism. I had made a trip that December, that was the first trip I had made, until lately, since March in the following spring.

Q. Were you on that step any time that day?

A. I remember getting on it once at Palestine.

108 Q. Is that east or west of Little Rock?

A. That's east of Little Rock.

Q. What occasion did you have for stepping on it?

A. We generally step on it to ride in. We were heading in.

Q. Did you get on there to make a coupling?

A. I got on there to ride in and make a coupling. We were heading in for the passenger train.

Q. What was the condition of the step at that time?

A. Well, it looked all right to me at that time.

Q. Did it feel all right?

A. I didn't pay much attention to it.

Q. Where was this step?

A. There was one on the left hand side and one on the right hand side.

Q. Don't you know that there is no step except on the right hand side of an engine? A. I think there were two.

Q. Are you positive?

A. I am not positive, but I think there were two on there.

Q. Which one did you step on?

A. The right hand step.

Q. Was that step in apparently sound condition?

A. Seemed to be to me, I didn't ride there far. I never make a practice of getting on the pilot.

Q. Why? A. It looks dangerous to me.

Q. Is it regarded as dangerous?

A. It ain't by everybody, but it is to me.

Q. You always avoid it? A. Yes sir.

Cross-Examination.

Q. Had you been warned by your brother not to get on that step?

A. Yes sir, he told me about catching on the step in front of an engine that way.

109 Q. Did he tell you that that step was in a bad condition?

A. Why, he told me that none of those steps were safe to get on, No. 5 and other small engines.

Q. Did he caution you about that particular engine, No. 5?

A. That was the first day we came out on No. 5.

Q. Didn't he warn you not to step on No. 5?

A. I was warned to be cautious about getting on all of those pilots.

Q. Didn't you say awhile ago that you were warned especially about No. 5?

A. Yes sir, he warned me about all of those small engines, and more particularly about these larger engines. That No 5 was a new engine, that was the first time I ever seen that engine or handled it, to be on a train with it.

Q. You are an extraordinary careful brakeman?

A. Yes sir, I am careful.

Q. How long have you been working for the Choctaw Railroad? A. For a long time, ever since 1892.

Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride, isn't it?

A. Yes sir.

Q. If an engine was moving at a slow rate of speed, it is not very dangerous, is it? A. No sir.

Q. It is not dangerous?

A. No sir, unless a person's scared of it, it's like playing with fire, it is liable to hurt you.

Q. You didn't see Tom hurt? A. No sir.

Q. You say that he said that he jumped on this step and was hurt? A. That's what he said.

Q. He was suffering a great deal and didn't talk much?

A. No sir.

Q. You didn't worry him much about the details?

A. No sir. I just helped to carry him to the hospital.

110 Q. You didn't ask him whether it broke or not?

A. No sir, only I asked him how he got hurt.

Q. How long did you say you had been working for this road?

A. I went to work the 13th day of September, 1892. That was my first trip.

Q. How long had you worked before the 6th of February?

A. I was employed by the company from along in October, 1897, up to that time, I had been off between.

Q. Do you know the general custom as to head-brakemen riding into yards? A. Yes sir.

Q. Was it customary for the head-brakeman to jump on this step on the pilot and ride into the yards to line up the switches?

A. Yes sir, we always thought that was our duty.

Q. You were not head-brakeman, were you? A. No sir.

Q. How many brakemen were there on that train?

A. I think there were three.

Q. You say you have known Tom Tennessee a considerable time? A. Ever since 1893.

Redirect Examination.

Q. Are you employed by the company now? A. No sir.
Q. How long has it been since you worked for them?
A. About the 24th or 25th of February of last year.
Q. You were discharged right after this accident?
A. Yes sir.

Recross-Examination.

Q. What are you doing now? A. Nothing at all.

111 S. H. Barnes, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. Mr. Barnes, what position do you occupy now?
A. With the Choctaw, Oklahoma and Gulf. I am trainmaster.
Q. What position did you occupy with them in February, 1900?
A. I was acting as train-dispatcher, working from midnight up until 8 o'clock a. m.
Q. How long have you been connected with the road?
A. With the exception of May and a part of June of last year, I have been with the Choctaw continuously from the 5th of January, 1900.
Q. In the trainmaster's office? A. Yes sir.
Q. What are the trainmaster's duties?
A. He has charge of all employes in the operating department, that is train, engine, station and yard service. He has general supervision of the handling of trains.
Q. Mr. Barnes, when a freight train comes into the yards I wish you would explain to the jury what the duties of the head-brakeman are?
A. Ordinarily his duties are to turn the switches leading into the yard and find a clear track for his train. The track leading from the main track to the yard we call the lead. Off of this lead there are various tracks where trains may enter and stand until we can further provide for them. The head-brakeman should open the main line switch and find a clear track leading from the lead, and see that there is nothing in front of his train, and to direct the engineer to run in until all of his train is in.
Q. In performing this duty is it necessary at any time for the brakeman to stand in the middle of the track and attempt to put his foot on the little step in front of the cow catcher when the engine is moving toward him? A. No sir.
Q. What should he do in a case of that kind?
112 A. If it is necessary for him to couple to some cars, he should signal his engineer to come ahead until he

gets within a few feet of the car he wishes to couple to, and then stop him and get on the step and make the coupling. We instruct them not to get on the front end of an engine while it is moving.

Q. If the train should go into the yards and the brakeman should get down and find a clear track and line up the switch so that the engineer could head in on that switch, where would be his place and what would be his duty immediately following that?

A. When the track is clear he should get on top of some car near the head of his train where he could see a signal from the rear of the train and transmit that signal to the engineer so that the engineer may know when his train is in the clear. Then he should stop when the train is in the clear and the head-brakeman should cut the engine off and permit it to go to the round-house. Sometimes the head-brakeman is required to take the engine to the roundhouse and sometimes the yard-master is required to take it.

Q. Is there any rule of the Choctaw, Oklahoma and Gulf Railroad Company, that was in force in February, 1900, that required a brakeman to stand in front of the engine and attempt to step on the pilot as the engine was moving toward him? A. No sir, there is a rule which prohibits them.

Q. Is it considered a dangerous practice to step on this step?

A. With a road engine it is. I mean by a road engine a freight engine, an engine that has a pilot. The yard engine is provided with a step.

Q. Just explain to the jury the difference between a switch engine and a road engine.

A. A switch engine has no pilot, or cow catcher as it is sometimes termed, but has a step which is perhaps six inches above the rail, fastened to the front end of the engine?

Q. Go ahead, Mr. Barnes.

113 A. Well, the switch engine has a step about six inches above the rail, there is one on each end of the engine. This front step hangs from what is known as the pilot beam and above this pilot beam is a hand-hold so that the switchman riding back and forth can stand on this step on each end of the engine holding on the hand rail; and while the railroad company does not permit them to get even on the yard engine while it is in motion—that is the rule—as a matter of fact the switchmen do it more than the roadmen with the road engines. The road engine has a pilot or cow catcher and no hand-hold to catch hold on and sometimes hasn't a step of any description. Ordinarily it has a small step on the bottom of the pilot, three or four inches wide. It is there for use when it is necessary to make what is known as the pilot-bar

coupling; and when the engine is supplied with an old style pilot-bar the brakeman, if he does as he should, will stop his engine within two or three feet from the car, then step on the step, pick up the bar, hold it up and when it enters the coupling of the car, signal his engineer. That is what that step is for.

Q. Is that step for any other purpose?

A. Nothing that I can think of. After the step is made we might use it to pass backward and forward over the pilot bar, or to reach over and get hold of the airhold.

Q. But that is the purpose of the step, to make pilot-bar couplings, is it?

A. Yes sir, the only other purpose is that the engineer might want to climb up on the front of his engine. He could then stand on there to see his draw bar.

Q. But there is no purpose for which that step is constructed which requires a brakeman to step on it when the engine is moving towards him?

A. No sir, he should not step on it when the engine is moving towards him. If he does not have to make a coupling he should get on the side of the engine. Steps are provided for that purpose on the side near the cab.

114 Court: After a man has thrown the last switch going into a yard, has he any duty to perform which requires him to get on in front?

A. None whatever, unless there is a car in front which it is necessary to make a coupling to, but then he should only get on the front end of the pilot after he has made the stop close to the car in order to enable him to pick up the bar.

Court: But if there is no car in there and he is simply going into the yard, is there anything whatever he should do there?

A. He should not be riding on the engine at all, he should get on top of a car in behind the engine to receive and transmit signals back and forth from one end to the other.

Cross-Examination.

Q. Where was your office at that time?

A. It was in Little Rock. I don't remember whether it was in the old office building or the depot, but I think it was in the old infirmary that we use for offices.

Q. How long had you been train dispatcher?

A. For this company just about thirty days at that time.

Q. What had been your position prior to that?

A. Previous to that I was employed on the St. Louis and San Francisco on the Paris Division as brakeman, and previous to that I was connected with various roads in Colorado as train dispatcher and trainmaster.

Q. Then as a matter of fact you had been employed by this company but thirty days before this accident?

A. Yes sir, thirty days.

Q. Where was your office?

A. It was in Little Rock proper in what is known as the General Office Building, which is close to the depot.

Q. That is on this side of the river?

A. At Second and McLean streets, yes sir.

Q. You never went out to instruct the men in person, did you?

A. No sir, that was not my business as train dispatcher.

Q. Your business confined you to your office on this side the river?

A. Yes sir, a man working as train dispatcher has no duties except office duties.

115 Redirect Examination.

Q. Your duties as train dispatcher, though, required you to be very familiar with all the rules and practices with reference to the operating department?

A. Thoroughly familiar; a train dispatcher frequently, and on some roads altogether, examines train and engine men and instructs them in their duties.

Q. A train dispatcher really takes the place of the General Superintendent in a good many things?

A. A train dispatcher, on duty, or what is known as a trick dispatcher, handles everything that may come up at any time. He refers matters that require action by some one in authority when he can reach them; but, for instance, a man working from midnight until 8 o'clock in the morning is the only man on duty at that time of night, and he handles anything, no matter what department it comes up in.

Q. So that at that time you were just as familiar with the rules, practices and customs of the road as you are now?

A. As I am now.

Q. I mean at the time you had been on the road.

A. With the rules, yes, sir, with the rules and practices of the road, certainly; but I was not as familiar with the physical condition of the road as I am now.

116 .... McKeiser, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What position did you occupy on the 6th of February, 1900, Mr. McKeiser?

A. I was machinist in the round-house.

Q. What duties did you have to perform as machinist?
A. It was my duty to repair all engines that came in.
Q. Do you remember the time Tom Tennessee got his leg cut off in the yards over there? A. Yes, sir.
Q. Did you do any repairs on Engine No. 5?
A. Yes, sir.
Q. When did you make those repairs?
A. I made them when I worked on the engine.
Q. I mean after the accident occurred.
A. Well, I worked on the engine as near as I can remember about six or seven hours.
Q. How long was that after this accident?
A. I don't remember.
Q. The next morning? A. Yes, sir.
Q. When you went to your duties? A. Yes, sir.
Q. Did you make any repairs on the step of the engine?
A. No, sir.
Q. Did you make all of the repairs?
A. Yes, sir, with two helpers.
Q. They were under your supervision? A. Yes, sir.
Q. When did you make any repairs in the step, if any?
A. I don't remember ever making any repairs on that step.
Q. Didn't make any on that step at all? A. No, sir.
117 Q. Make any a few days after this accident?
A. No, sir.
Q. A few days before? A. No, sir.
Q. What was the condition of the step apparently?
A. It was in very good condition.
Court: Was it properly fastened? A. Yes, sir.
Court: Was it loose in any way? A. No, sir.
Court: Was it perfect?
A. Yes, sir, as far as I could see perfect.

Mr. Peirce:
Q. Your exclusive business was to work on those engines?
A. Yes, sir.
Q. Did you have anybody else?
A. When there was a rush of work sometimes.
Q. I mean at that time? A. No, sir.
Q. Then you can say that whatever work was done on it was necessarily done by you? A. Yes, sir.

Cross-Examination

Q. What was your position in the machine shop?
A. I was machinist, working in the round-house.
Q. Who had charge of it?
A. Mr. Robkins was the master-mechanic.
Q. Were you running the shop? A. No, sir.
Q. Who was? A. Mr. Robkins.

Q. How many men did you have?
A. Altogether—I suppose you want to know all that were connected with the round-house?
118 Q. How many machinists?
A. No other machinist except me.
Q. You undertake to say that you did all the repairing for the whole road? A. All the machinist repairing, yes, sir.
Q. Did anybody else do anything?
A. No other machinist work.
Q. How many men were employed in there?
A. Probably twelve or fifteen.
Q. Do you undertake to say that they didn't do any work on the engines? A. No, sir, not any of the machinist work.
Q. Suppose a step was securely fastened and then became loose, would it take an experienced machinist to perceive that? A. That was a part of my duty.
Q. You were to make the repairs of the whole road?
A. No, sir.
Q. Who else helped?
A. I had a couple of darkies helping me.
Q. Where are they?
A. One of them is at the round-house yet.
Q. Where is the other? A. I don't know.
Q. Where did you take charge of this engine the next day?
A. Early in the morning.
Q. How early? A. After 7 o'clock.
Q. Was that the first engine you overhauled?
A. I don't remember now.
Q. You worked on it six or seven hours? A. Yes, sir.
Q. Did you make any record of your day's work in the shop?
A. Only the record book, which tells how long I worked on it.
Q. You worked on it six or seven hours?
A. Yes, sir.
119 Q. How came you to examine that particular step?
A. I usually examine the whole engine, go over and make a careful inspection of the whole engine.
Q. Did you have any reason to examine that particular step? A. No particular reason.
Q. There was no complaint about it, was there? A. No sir.
Q. But you went to it the first thing in the morning?
A. No sir.
Q. How did you examine it?
A. I took a casual glance at it.
Q. You had no particular reason to examine it?
A. No sir.
Q. You couldn't say you went to it the first thing?

A. No sir.
Q. Can't you tell about what time you examined it?
A. No sir.
Q. How long after you went to work was it before you took charge of this engine?
A. I don't know that, I am sure.
Q. How do you know you worked six or seven hours on it?
A. I know by how much I had to do on the engine.
Q. When did you finish it up?
A. About 4 o'clock in the afternoon.
Q. How long were you off at noon? A. One hour?
Q. From 12 to 1? A. Yes sir.
Q. Have you examined your record as to whether it shows what time you commenced to work on the engine? A. No sir.
Q. Would that record show it?
A. Only as to how much time I put on it.
Q. It wouldn't say what time you began? A. No sir.

F. C. Weaver, being duly sworn, on behalf of the de-
120 fendant testified as follows:

Direct Examination.

Q. Mr. Weaver, what were you doing in January or February, 1900? A. I was running a freight train.
Q. Where from?
A. From Little Rock to Memphis, Hopefield rather.
Q. Do you know Thomas Tennessee? A. Yes sir.
Q. Did he ever make any trips with you?
A. Yes sir, one trip.
Q. Where did you leave from on that trip?
A. We left from North Little Rock, from the new yards over there.
Q. When you came in, where did you go?
A. Into the new yards.
Q. What position did Tom Tennessee occupy on that train?
A. He was head-brakeman.
Q. Do you remember how much of the lead track you had to pass through on that trip? A. No sir, I do not.
Q. You went in on the lead track first? A. Yes sir.
Q. What time did you leave and what time did you get in?
A. I left at 6:55 and arrived back at 12:05 in the afternoon.
Q. Was the condition of those tracks apparent to any one going in there on a train? A. I suppose so.
Q. There is nothing to prevent any one from seeing the condition, is there? A. No sir.
Q. You say Tom Tennessee was head-brakeman, where should he be on a train?
A. It is the head-brakeman's duty to throw the switches in front of the engine, and head into the yards. Next after he

does that, then he gets on top of the train, that's the
121 proper position until the rear of the train is all pulled into the yard.

Cross-Examination.

Q. You say you made one trip with Tom? A. Yes sir.
Q. What date?
A. December 20th we left here, and arrived back the 22nd.
Q. You left at 6 o'clock? A. At 6:55.
Q. Was that day-light?
A. I don't remember, it was in December.
Q. Did you have to use lanterns?
A. I don't remember that. Of course, I only know what time we left from the record of our trip.
Q. The train was all made up and you and Tom took charge of it and went out? A. The train was made up.
Q. The crew had nothing to do with making up the train, did they?
A. Nothing except coupling the engine on. We brought the engine up from the round-house and put it on the train.
Q. What time did you get back?
A. 12:05 in the day-time.
Q. When you got your train in, you could go right off to your boarding house? A. Yes sir.
Q. You didn't have to do anything with the train, you left the cars right there after you got in?
A. Yes sir, the only thing we do is to cut the engine off.
Q. That's the only trip you made with Tom? A Yes sir.
Q. He was head-brakeman, you say? A. Yes sir.
Q. Is that the most important brakeman on the train?
A. Not necessarily.
Q. One of the most important?
A. Well, I don't know that his duties are more im-
122 portant than any other. There is no rule about that.
Q. He generally rides in on the front of the engine when he is coming into the yards like those in Argenta, doesn't he?
A. He has no business on the engine until the train stops. Then it is his duty to get on there.
Q. I asked you if, when coming into the yards, his business is not at the head of the engine?
A. Yes sir, it is his business to go ahead of the engine and throw the switches.
Q. After he has thrown the last switch, if there is any cars to be coupled on in front of the engine, he still stays in front?
A. Yes sir, if he has to couple on to a car.

123 I. M. Wightman, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination.

Q. What are you doing now?
A. I am general yardmaster of the Choctaw.
Q. Whereabouts?
A. For the Choctaw, Oklahoma and Gulf, both sides the river.
Q. Here at Little Rock? A. Yes sir.
Q. How long have you been with the Choctaw?
A. Ever since 1894.
Q. Did you occupy a similar position before you came here?
A. Yes sir, at Shawnee.
Q. What are your duties in that position?
A. I handle the crews in and out
Q. When a crew is coming in from a trip, explain to the jury what the duties of the head-brakeman are, and where he should be in the performance of those duties?
A. In coming into the yard, the head-brakeman should turn the switches in front of the engine. If the track is clear he leaves the cars there, but if there are any cars in front of him he should couple to them and push them on until the train is in the clear. Then he should cut the engine off and take it to the round-house.
Q. After he has turned the last switch and the engine is headed in, what is his duty and where is his position?
A. He is supposed to get on top where he can see what is going on.
Q. On top of what?
A. On top of a car behind the engine where he can be seen from the rear end.
Q. Where is that? A. The car is behind the engine.
Q. Why do you say he is required to be there?
A. So he can see what is going on, if everything is all right, and so he can signal the engineer when the train is in the clear.
124 Q. In the dicharge of his duty, is the head brakeman coming into the yards—is there any duty for him to perform which requires or is necessary for him to stand in front of the moving engine and attempt to step on that small step attached to the cowcatcher?
A. No, sir, there wouldn't be unless he is heading on to a car.
Q. Then what is his duty?
A. When it comes up to the car he is supposed to get in front and make the coupling.
Q. How near the car?
A. Well, I don't know exactly. As a general thing he gets on at 10 or 15 feet from the car.

Q. He is supposed to get on the step at 10 or 15 feet to make a pilot bar coupling? A. Yes, sir.

Q. And if there is no car on the track which he is heading in on, is it necessary or proper for him to jump on that pilot?

A. No, sir.

Q. Is there, or has there been since you have been connected with the company, any rule that requires a head-brakman or anyone else to step up there in front of the pilot when the train is moving toward him.

A. None for him to do it.

Q. Are you familiar with the different switches over there? With that switch where Tom Tennessee got hurt?

A. I couldn't tell, I don't know where he got hurt.

Q. Do you know where the third switch is? A. Yes, sir.

Q. How many switches are there?

A. There are eight tracks.

Q. You know the location of the third switch, do you?

A. Yes, sir.

Q. After the head-brakeman turns the last switch that will head the train in on that track, is there any other switch for the brakeman to turn below there?

A. No, sir, not on that lead.

125 Cross-Examination.

Q. If there hadn't been room on that switch, wouldn't he have to throw a switch down there to let the train in on the lead track?

A. If there wasn't room at the lower end, it is owing to how many cars it will hold. That switch will hold 37 cars.

Q. If there had not been room on that third switch, wouldn't the head-brakeman have to throw two or three more switches down below? A. One.

Q. Wouldn't he have to throw the switch where No. 3 joins on to the lead? A. Yes, sir.

Q. And he might have had to throw No. 4?

A. Might have had.

Q. Then when he came on over, the next switch, the cross switch? A. No, sir, we go into the round-house then.

Q. He would have to throw that wouldn't he?

A. It wouldn't be necessary for him to, it was either thrown for the round-house or the other leads.

Q. It depended entirely as to what his duty was whether that switch was long enough to hold the train, didn't it?

A. Well, it is not necessary, he shouldn't have got on the front end to ride 37 car lengths.

Q. I am talking about his duty in throwing switches.

A. Well, it wouldn't be necessary for him to go through it. If it didn't hold him, he would double over on the other track.

Q. Suppose there had been other switches to throw, for instance if he had gone in on No. 3, and he didn't know that it would only hold 15 cars and he had 30, he couldn't have told whether he had the other switches to throw or not?

A. He should wait and see until he got a signal from the rear end and pull in as far as he could.

Q. In that case there would have been more switches to throw? A. Yes, sir.

Q. You have been in the employ of this road since 1894?

A. Yes, sir.

126 Q. You came down from the west division?

A. Yes, sir, I came from Shawnee.

Q. I will ask you if when a man gets on the front end of the engine to make a coupling if he doesn't get on 12 or 15 feet before it comes up to the car?

A. Yes, sir, generally and places his pin on to the car he is coupling to.

Q. Then as a matter of fact they usually get on this pilot before the engine stops entirely?

A. There has been a rule that they couldn't do it.

Q. I am not talking about the rule, is it not a fact that they do do it? A. Yes, sir, some men do.

Q. Is it not a common thing for them to jump on this step 10 or 15 feet before they come to a stop?

A. If they are going very slow.

Q. If they are going slow, is it safe?

A. Sometimes it seems not to be, but a man takes his chances.

Redirect Examination.

Q. Mr. Wightman, I don't think you understood Mr. Blackwood's question about coming in on that track. Look at this map. Here is the track. Coming in from Memphis here is Track No. 3 there. On that Track No. 3 it shows that the capacity is 41 cars. Now, if the head-brakeman turns the switch and heads the train in on No. 3 which has a capacity of 41 cars and there are no other cars on that track, what is the duty and where is the position of the head-brakeman?

A. Aftr lining up the third switch, he should get on top, as I said, to see that his train is following him.

Q. It is his business to get on top of the first or second car behind the engine?

A. Yes, sir, that's the way I answered.

Q. Then has he any business, for any purpose, to ride on the front end of the engine?

A. He should not, he has none.

127 Q. Would that be an improper discharge of his duty under circumstances of that kind? A. It would.

Q. If he had gone in on Track No. 3 and found that there was not room and he had gone in on Track No. 4, who would have to throw that switch and who should attend to that switch that leads in from the lead track?

A. The rear brakeman.

Q. Then the head-brakeman has nothing further to do until the engine has backed out of track No. 3 and gone back on the lead track and then down the lead track to the next switch?

A. I don't quite understand.

Q. Then they come down there and double over?

A. Yes, sir.

Q. Then, even in that case, before he turned the switch these cars would have to be cut?

A. No, sir, he would have to open that switch and pull up here until the hind end man gave him the signal to be in the clear.

Q. If he comes in on track No. 3 and they have to double over, and there is no cars on the track, you say it is his business to get on the car behind the engine to see that the train follows in on the track; and then when they find that they have to double over it is his business to get down and open this switch?

A. Yes, sir, and pull on up until the rear man gives his signal to stop.

Q. If a brakeman were sitting on the front end of the engine could he see a signal from the rear end of the train?

A. No, sir.

Recross-Examination.

Q. Couldn't the swing-brakeman give the signal then?

A. No, sir, the track is on a curve, he couldn't see it.

Q. It is not on much of a curve, is it?

A. It's on a pretty good curve.

Q. Wouldn't the swing-brakeman have been the proper man to give the signal?

A. All brakemen when pulling in on a side track are supposed to be on top.

128 A. H. Kilpatrick, being duly sworn, on behalf of the defendant testified as follows:

Mr. Peirce:

Q. What is your name? A. A. H. Kilpatrick.

Q. Do you know Tom Tennessee? A. Yes, sir.

Q. Did you have any talk with Tennessee about the accident resulting in his leg's being cut off? A. Yes, sir.

Q. How long after was it?

A. Since he got out of the hospital.

Q. How did he tell you it happened?
A. He told me he went to get on the pilot and slipped.
Q. Did he tell you the step gave way and he fell?
A. No, sir.
Q. Never did? A. Never did.

Cross-Examination.

Mr. Blackwood:

Q. You are the claim agent, aren't you? A. Yes, sir.
Q. You went to Tom to pump him about this accident, didn't you? A. No, sir, he came to my office.
Q. You wrote down what he told you? A. No, sir.
Q. Didn't you have a stenographer there to take down what he said? A. No, sir.
Q. Did you ever make a statement to the attorney?
A. No, sir.

Redirect Examination.

Mr. Peirce:

Q. Is it not a fact that the only statement we have at the office from Tennessee is the one Mr. Vaughan furnished?
A. I don't know, Mr. Peirce, I never took one from him myself, I don't know if there is.

129 Charles Robkin, being duly sworn, on behalf of the defendant testified as follows:

Direct Examination

Q. What is your name? A. C. Robkin.
Q. What were you doing in February, 1900, Mr. Robkin?
A. In February, 1900, I was master mechanic for the Choctaw, stationed at Argenta.
Q. Do you remember the time Tom Tennessee got his leg cut off? A. Yes, sir.
Q. Where were you at that time?
A. I was at my office in Argenta.
Q. Is that at the round-house?
A. It is close to there.
Q. Were you there when the engine came in?
A. Yes, sir.
Q. Were you informed of this accident at that time?
A. I was informed of the accident when the engine rolled into the round-house.
Q. Were you informed how the accident occurred?
A. Yes, sir.
Q. What inspection did you make in view of the information you had received?
A. I looked over the pilot. The accident was from that part of the engine.
Q. Did you examine the step? A. Yes, sir.

Q. What was the condition of the step?
A. The step was all right.
Q. Sound, was it? A. Yes, sir.
Q. Are you in the employ of the Company now?
A. No, sir.

Cross-Examination.

Q. What business are you in now?
A. The meat business.

Defendant rests.

130 Whereupon, the plaintiff, to rebut the evidence of the defendant, introduced the following testimony, to wit:

Thomas Tennessee, being recalled, testified as follows:

Direct Examination.

Q. It has been stated here that after you threw the switch for No. 3 you had no further business on the end of the pilot. Just state to the jury what, if any, business you had after you threw the switch and started to go on.

A. Why, I didn't know how long the track was and didn't know whether it would hold the train or not. Didn't know the length of the track and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches.

Q. How many other switches were there that you might have had to throw if this No. 3 had not been long enough to contain your train? A. Possibly three or four.

Q. What switches were they?

A. There was the lead switch to No. 3. I would have had to throw it because it was always lined up with the cut-off switch; and possibly to No. 4 track or No. 5. Probably the switch might have been headed into the round-house track and I wouldn't have wanted to go over there.

Q. You testified here yesterday that that was the first time you were ever in on this No. 3 track?

A. Yes, sir, the first time I had ever put a train on No. 3 track.

Q. You say you did not know its length? A. No, sir.
Q. You did not know how many cars it would hold?
A. No, sir.
Q. What was the extent of your train?
A. I don't know exactly how many cars we had. We had a pretty good train though.

131 Q. Was it a through freight from Memphis?

A. It was not a through freight, it was a local freight, but we picked up all the cars that were coming that way. They said we were the only crew coming this way and we picked up everything that was coming. Had a pretty good train.

Q. At the rate of speed he was going, just tell the jury whether or not it was dangerous for you to try to get on there, apparently dangerous.

A. No, sir. With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still.

Q. It was stated that you were warned at Forrest City about getting on this step, and that you got on it at a great rate of speed.

A. Why, there wasn't any one said anything like that.

Q. Now, you have heard the testimony of Mr. Vaughan and Mr. Kilpatrick and Mr. Cuneo, and probably some others, that you said that you suffered this injury by slipping off of the step. Did you tell them that?

A. I told them, each and every one of them, every time they talked with me about it that I stepped on the step of the engine and it gave way with me and I fell off.

Q. You have heard the testimony of Mr. McAvoy about the condition of the yard, in which he stated that he thought most of the tracks were filled in. Was this track filled in at the place you were hurt?

A. No, sir, it was not filled in at the place I was hurt, for after I got hurt they set my lantern on the ties and I looked at them and there wasn't anything at all between the ties, just the ties lying up on top of the ground.

Q. Did you have ample time to observe it?

A. Yes, sir, I was as conscious as I am now.

132 Q. How long did you stay there?

A. I reckon I stayed there nearly an hour.

Q. With your lantern and had nothing to do except to look at it?

A. Yes sir, they tied a string around my leg and stopped it from paining me so much.

Q. Have you ever assisted in building new yards on railroads?

A. Yes sir, I have. I have helped put in about three or four yards to my knowledge.

Q. What was the extent of these yards?

A. Well, I helped to put in one yard which was a pretty good sized yard. It had about 23 or 24 tracks in it.

Q. Where was that? A. At Covington, Kentucky.

Q. How many others did you put in?

A. I helped to put in other yards in Kentucky. One pretty big one.

Q. How many switches did it have?

A. I don't know just exactly, but there was something like 25 or 30. It was a good big yard. A good big saw mill was there. And I helped in another yard there at St. Helena, Kentucky.

Q. How were these others fixed up before they were put in general use?

(Counsel for defendant objected to the above question because the same was incompetent, immaterial and irrelevant. Whereupon the Court asked the witness the following question:)

Court: A large yard, such as this, and where the ground is such as it is there, are freight trains permitted to run in before it is completed or not?

A. No sir, they are not allowed to go in.

(Counsel for defendant objected to each of the above question and answer because the same were incompetent, irrelevant and immaterial and because the proper foundation had not been laid to qualify the witness to answer said question. The Court overruled said objection, and the defendant saved its exceptions.)

Court: The question is not what was done in any one
133 yard, but do you know how yards of this kind are made and how they are managed? A. Yes sir.

Court: Can you state that freight trains are not permitted to go into a yard until everything is complete?

A. All that I ever seen. They would fill them in and have them ready for general use—until the tracks were filled in with gravel or something.

(Counsel for defendant objected to each of the above question and answer because the same was incompetent, irrelevant, and immaterial and because a proper foundation had not been laid to qualify the witness to answer said question. The Court overruled said objection, and the defendant saved its exceptions.)

Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them? A. No sir.

Court: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

(The Court rules that the testimony will be excluded unless further foundation is laid.)

Counsel for Plaintiff:

Q. You say you have had had experience in helping to build at least three yards? A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Well, two of them were larger, and one of them was about the same size.

Q. What was the difference in the ground or soil from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, soil like this? Or was it a rocky foundation? A. No sir, it was solid dirt.

Q. Dirt something similar to this over here where this yard was built? A. Yes sir, I suppose so.

134 Q. Have you had any occasion from your own experience in the railroad business to notice the drainage or settlement of dirt around the ties, how it affects the road when it is newly built, how it should be built in order for it to drain successfully and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it in with gravel.

(Counsel for defendant objected to each of the above question and answer because they were incompetent, irrelevant, and immaterial, and because the proper foundation had not been laid to qualify the witness to answer the said question. The Court overruled said objection and the defendant saved its exceptions.)

Court: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

(Counsel for defendant objected to each of the above question and answer because they were incompetent, irrelevant and immaterial, and because the proper foundation had not

been laid to qualify the witness to answer the said question. The Court overruled the said objection and the defendant saved its exceptions.)

Counsel for Plaintiff:

Q. There was something said about the use of a switch
135 engine. Do you know the difference between an ordinary engine and a switch engine? A. Yes sir.

Q. Is a switch engine practicable for heading from Memphis over here, a long distance, or is a switch engine just used about the yards?

A. The switch engine is only used in the yard, never used at all out on the road.

Q. When you speak of its having been the custom, as you did yesterday, of stepping on this front step with a view to making a coupling or with a view to unlocking the switches in advance of you, do you mean that that was in reference to switch engines proper or to engines that were coming into the yard from a distance like the one you were riding on?

A. I meant a road engine. An engine with a pilot to it. A switch engine hasn't any pilot.

Cross-Examination.

Q. You say that you observed the condition of this track that night after you were injured? A. Yes sir.

Q. And that is the time and manner in which you got your opinion that you are testifying from now? A. No sir.

Q. I am talking about the condition of that road-bed?

A. No sir, I looked at the track at that place where I fell.

Q. That was the time you got your information about the condition of that track—while you were there by the side of the track in an injured condition?

A. At that place there wasn't anything at all between the ties.

Q. That was the time that you got your information?

A. That was the time I seen there wasn't no dirt between them ties. I didn't see any; I looked good.

Q. You looked then, after you were hurt, to see if there was any defect in the road-bed? A. Yes sir.

136 Q. Which made the better light that night, the electric head-light or your lantern?

A. The electric head-light, of course.

Q. Made a better light than your lantern? A. Yes sir.

Q. What capacity were you engaged in while helping to make these yards that you testified about?

A. Well, one yard I worked in I worked a gang of men all the while, surfacing up the track and gauging it.

Q. You were never superintendent of a road?

A. No sir, but I was foreman.

Q. You were never civil engineer of a road? A. No sir.

Q. You were the foreman of a gang of men and you had to make their time, didn't you? A. Yes sir.

Q. You never took charge of a yard and had it laid out, did you? A. No sir.

Q. And you never started one from the beginning and worked on it until it was finally completed, did you?

A. I have seen superintendents.

Q. I am asking you what you have done, if you ever had charge of the beginning of the construction of a new yard and the ending of it?

A. I have never had the beginning of it, but I have had the ending.

Q. You just worked as a day laborer, didn't you?

A. I was foreman of a gang.

Q. Being foreman didn't amount to anything more than your keeping the time of the men to see whether they worked or not?

A. Yes sir, I had to see that the work was done properly, else I couldn't have held the job.

Q. You got your instructions from others, didn't you?

A. No sir, I got mine from working on the track.

137 Q. Do you mean to say that they just turned you loose and told you to do as you pleased?

A. No sir, I got my instructions from working —section foreman.

Q. You just instructed the men to do what you were instructed to have them do? A. Yes sir.

This was all the testimony in the cause on both sides.

138 And this was all the testimony given in the cause on both sides. The defendant thereupon asked the Court to instruct the jury as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

The Court refused to give said instruction and defendant, by its counsel, then and there duly excepted to said ruling of the Court and asked that its exceptions be noted of record, which was accordingly done.

139 The Court thereupon, of its own motion, charged the jury as follows:

"Gentlemen of the Jury: In this action, which has been brought by the plaintiff against the defendant to recover $5,000 for injuries received by him while he was in the employ or service of the defendant company and which resulted in the

loss of his leg, the claim for damages made by the plaintiff is based upon two distinct causes or acts of negligence on the part of the railroad company.

"It is claimed first that the company was guilty of negligence in having the step or plate in front of the pilot of the engine insecurely fastened, so that when this plaintiff, in the discharge of his duty, stepped on it, while the train was in motion, it gave way, precipitating him to the ground, and by reason whereof he lost his leg and suffered the injury for which he has now instituted suit.

"Secondly, it is claimed that the company was guilty of negligence also in keeping the track going into the yard and on which this accident occurred in a condition whereby this accident was in part caused. The specific ground is that between the ties the track was not filled up so that when this man fell his foot was caught in it, and on account of the deep depression between the two ties he could not extricate his foot, and but for that fact he would not have lost his leg and sustained the injury for which he now sues.

"These are the two grounds of negligence which are charged against the railroad.

"The railroad company denies, first, that the step was not properly fastened. They say that the step or plate was properly fastened, and that in any event, so far as this plaintiff is concerned, he had no business on the plate.

"They also deny that they were guilty of negligence in keeping the track in the condition which it is shown to have been in, that is, that the ties were lying upon the ground and the space between the cross-ties were not filled in.

140 "They deny that under the conditions then existing, that was negligence; and they have set up as a further defense contributory negligence on the part of the plaintiff, or in other words, they say that even if it be true that the railroad company was guilty of negligence yet this accident would not have happened but for the fact that the plaintiff himself was guilty of contributory negligence, that is, such negligence which made this accident possible.

"And they set up as a cause of this plea, the fact that he had no business, while the train was in motion, to attempt to board the engine on that little narrow step in front of the engine attached to the pilot, and if he did so he did it at his own peril and at his own risk, and if by reason of stepping on it he suffered any injury, the company is not liable.

"Now, I want to explain to you, as briefly as possible, the law which is applicable to the issues which are involved. I want to state to you at the outset, gentlemen of the jury, that under our system of jurisprudence a jury is as much a part of the court as the judge is. The law divides their duties by confining to the judge exclusively the determination of all questions of law. It is the duty of the judge to tell the jury what the law is, so far as it is applicable to the case.

"On the other hand, the determination of all the facts in the case is left exclusively to the jury. Your duties and your prorogatives in determining the facts are just as great as those of the Court are in determining what the law is.

"If, at any time in my charge to you, I allude to some of the testimony which has been introduced here, I want you to remember that while I shall try not to express any opinion as to what your finding should be, yet if I should say something that might lead some of you to believe that I have a fixed opinion as to what your verdict should be or what your findings of the facts should be, I want to say to you now in advance that you are mistaken, and to any opinion which I may express on the facts you are to pay no attention, because it is you and
141 you alone who must determine the facts, and you must do it in accordance with the dictates of your conscience and in conformity with your oath to render a true and correct verdict according to the law and the evidence in the case.

"The Court has no power to interfere with you in the determination of any of the facts, and you do not have a right to interfere with the Court in determining what the law is.

"Now, I want to call your attention to the law in the case.

"The duties which a railroad company, or any other employer, because there is no difference between a railway company and any other employer, owes to its employes are quite different from those which it owes to its passengers.

("What it owes to its employes is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident.)

To the above part of the Court's charge enclosed in brackets, commencing with the words "what it owes to its employes," and ending with the words, "do not contribute to the accident," and embracing the whole of the foregoing para-

graph, all of which is enclosed in brackets, the defendant, at the proper time and in the proper manner, duly objected upon the ground that the same was not a correct statement of the employer's duty to its servant. But the Court overruled said objection, to which the defendant, at the time, saved its exceptions.

"You are, therefore, to determine from the evidence the first question raised by the plaintiff,—whether the step or plate in front of the engine and attached to the pilot, on which the plaintiff tried to step at the time of the accident, was, by reason of defendant's negligence, insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was injured as alleged while trying to get on the step in the proper discharge of his duties as a brakeman. That is the first question for you to determine, "was that plate fastened securely or not?"

"If you find from the evidence that it was properly fastened, then you need pay no more attention to that particular part of the case.

142 "But, on the other hand, if you find that it was not properly fastened, then there are other questions to be considered by you in connection with the matter.

"The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

"If under the rules either as communicated to him or as he should have known them by the exercise of due diligence, he was not permitted to get on there, yet in violation of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving away and he can not recover.

"But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act, could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by reason of having done so, then he cannot recover.

"Now, as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in

a reasonably safe condition and by reason of that failure the plaintiff, by no negligence of his own, sustained the injury complained of, then it is liable.

"Provided also that the plaintiff, at the time of the accident, did not know, or by the exercise of [reasonably] diligence could not have known, the condition of the track; but if he knew the condition of the track or could have known it by the exercise of reasonable diligence and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover.

"Now as to the duty of providing a reasonably safe place for the servant's work, the Court instructs you that when a place is in such condition as similar places under like con-
143 ditions are usually kept by well-managed railroad corporations, then the company has fully discharged its duty towards its employes and is not liable for injuries sustained by its servants, for the law conclusively presumes that when a man accepts employment which is of a dangerous nature, such as railroading, he is willing to assume the risks incident to his employment and will be entitled to no damages for injuries sustained in such employment, unless it is shown by the evidence that the employer or master was guilty of negligence by failing to provide such a safe place for the servant to perform his duties as under like conditions others engaged in the same business are in the habit of furnishing.

"Now, in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company was guilty of negligence in allowing, at that time, and that place, the track to remain with the spaces between the cross-ties unfilled whereby its servants or employes might get their foot caught and perhaps get injured.

"Now, in determining what would constitute negligence so far as this case is concerned, you are to take into consideration the place where this accident occurred. The evidence tends to show that the place where this injury occurred was a railroad yard.

("Now, as a general rule, where the tracks are in large railroad yards where there is a great deal of traffic going on and where a great many employes walk to and fro in crossing the tracks, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them.)

To the above part of the Court's charge enclosed in brackets and embracing the whole of the foregoing paragraph, the defendant objected upon the ground that the same was not a

proper statement of the law as applied to this case. But the Court overruled the said objection and the defendant at the time saved its exceptions.

"But, on the other hand, you are also to consider the fact that these yards had but recently been made, and you are to determine from the evidence that has been introduced, giving due weight to the testimony of each witness that has testified, considering, for the purpose of determining the weight to be given to his evidence, his knowledge, his interest in the matter, and his experience.

144 "Now, after you do all that, then you are to determine from that evidence whether, in view of the fact that this yard had but recently been made, it was proper or improper to leave it in the condition that the evidence shows it was in.

"It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence, not extraordinary but ordinary diligence, to have filled up this track—the spaces between the cross-ties—before the time when this accident occurred on the night of February 5th, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that they might settle the road-bed and the yards be drained, as was testified to by one of the witnesses.

"Now, as I stated to you before, gentlemen of the jury, in determining what weight should be given to the testimony of each witness, you are the sole judges of it, but I want to say to you, and I am simply expressing my own opinion, that you should consider a man's experience, his interest in the matter, and where a man has been superintendent and engaged in making yards, planning them and laying them out, his testimony is entitled to much greater weight, in my opinion, than a man who simply worked as a common laborer, or even a section boss or a boss over a few men.

"But then, as I stated to you before, you are the sole judges of the credibility of each witness and it is for you to determine which of the witnesses is entitled, where there is a conflict in the evidence, to be believed.

"Now, you are also to take into consideration whether it is usual and proper for well-managed railroads, when a new yard is laid out and has just been completed, to permit the spaces between the cross-ties to remain open for several

months, and whether it is usual to have freight trains running over the tracks into the yard in the condition that this
145 track was at the time this accident occurred.

"Now, the knowledge on the part of the plaintiff of the condition of the tracks as well as of the machinery is very important, for if an employe has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is not the kind of danger I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

"Now, if he sees that the place is dangerous, and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts, then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having filled it up, for the servant has a right to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the facts, then he must do so at his peril.

"Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or the step as the evidence shows it was in, or not.

"If he did not know it and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

"But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own experience told him he should not get on and when there was other provisions and better provisions made for a man to get on a train while it was moving, then, gentlemen of the jury, he can not recover.

"And I want to say to you that a mere custom does
146 not justify a person boarding a moving train where it is dangerous to do so; his duty is to signal the train to

stop if it is necessary for him to get on, and if he is injured by reason of trying to get on a train while in motion, and it is seen to be dangerous, he cannot recover, the law being that although the negligence of the railroad company may be the principal cause of a man's injury, yet if he was careless himself, if the want of attention to his own safety (contributed in any considerable degree to his injury), the railroad company is not liable.

To the above part of the Court's charge enclosed in brackets, "contributed in any considerable degree to his injury," the defendant at the time objected for the reason that it is not a proper statement of the law of contributory negligence as applied to this case. But the Court overruled said objection, and the defendant at the time saved its exceptions.

"An employe cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

("Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose commands he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way but that he slipped by reason of the fact that the weather was bad, and he fell and was injured and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I explained it to you a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover.)

To the above part of the Court's charge enclosed in brackets and embracing the whole of the foregoing paragraph, the defendant at the time objected on the ground that it is not a proper statement of the law as applied to this case. But the Court overruled said objection, and the defendant at the time saved its exceptions.

"But, on the other hand, if he had no business to get on that plate but his duty was to jump on the back step, or the step back of the engine which was wider and more suitable for a man to jump on, then it is immaterial whether the plate
147 in front was securely fastened or not,

"if that was the proximate cause of the injury he received, he cannot recover.

"If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact it was a new track, then the plaintiff cannot recover.

"Now, in determining whether this plate was intended to be used as a step to get on when the train is in motion, you must consider the fact that this step was but a narrow strip, that to stand on it a man's foot must be sidewise; while, on the other hand, switch-engines which run both backwards and forwards have a regular step wide enough for a man to step on, thus showing that apparently there is a distinction made by railroads between the ordinary freight engine and the switch ergine. And it is claimed by the defendant in this case that there is a difference in the duties of the employes on trains drawn by these respective engines.

"I do not know that there has been any evidence introduced on that point, gentlemen of the jury, but I want to say to you that if any evidence has been introduced tending to show that subsequent to the date of the injury the defendant either removed the plate or step from the pilot of the engine or filled in the spaces between the cross-ties, such evidence is not to be considered by you in this case as evidence that it should have been made prior thereto.

"Now, gentlemen of the jury, if your verdict is for the defendant, that is, if you believe under the charge of the Court and the evidence that has been submitted to you, that your verdict should be for the defendant, then you will simply say, "We, the jury, find for the defendant," and you need not consider anything further in this case.

"But if you think, and your verdict is that the plaintiff is entiled to recover a judgment, then, gentlemen of the jury, the next duty you have to perform is to assess the damages;
148 that is, you must determine what damages should be awarded to the plaintiff against the defendant by reason of the injury sustained by him in this accident, if the defendant is liable.

"I will state what you are to consider in assessing these damages.

"He is entitled to the expenses incurred by him in seeking to get cured; that is money expended for medical attendance and drug bills during that time.

"He is entitled to damages for his loss of time. If, on account of the accident, he was unable to perform any work, the time he could do nothing he is entitled to be compensated for. He is entitled for what you think will compensate him for the difference in what he could have earned if this accident had not occurred and what he can earn by reason of having lost his leg. The difference between these two sums he is entitled to, taking into consideration what you believe his time is worth.

"In determining the difference in wages which he may earn hereafter evidence has been introduced to show what, according to the life tables, the probabilities are as to the duration of his life hereafter. I believe the evidence introduced tended to show what his age was at the time the injury took place and the probabilities of living are 33 years and a fraction over, 33 9-10 years, at that time. Now, of course, it might be less.

"Now, gentlemen of the jury, I want to say to you that these tables are not conclusive on you, because you know that no one can say that a man is going to live a certain number of years. These tables are based on averages and the experience of men who have devoted their time to it and are thoroughly conversant in the science of making up these tables. But this is a matter for you to consider, and it is for you finally, gentlemen of the jury, to determine what you think the probabilities of his life are, that is, how long he may live.

"These are damages that can be calculated by you with mathematical precision. You can take a piece of paper
149 and a pencil and set down the proof showing that there was so much paid out for medicine and doctor's bills, I believe he testified $100.00. There was evidence tending to show that he was earning $65.00 a month and that he has been out so many months without doing anything, so you can figure that time at $65.00 a month.

"You may also figure about how long he is going to live and what he is likely to earn and what he could have earned if he had not been injured.

"But now there is one other matter of damages which is to be considered by you, about which the Court nor any one else can help you, and that is the damages that the law allows to parties that have been injured and suffered great pain, the damages allowed for the pain and suffering, both mentally and bodily.

"That is a matter, gentlemen of the jury, that you must use your own judgment about, taking into consideration a man's condition in life, his station in life, his occupation, and all

these matters, and then determining what, if he is entitled to any, damages would be a reasonable compensation for the pain which naturally a man must suffer both mentally and physically if he is injured as this man has been.

"But, of course, gentlemen, in assessing this damage you must be guided by the same rules as you will be guided in weighing other testimony, and that is this, to have no bias or prejudice for or against either party to this action.

"The fact that this man is a helpless cripple and the other party is a railroad is a question that must not, in any way, influence you when you render your verdict.

"The question which you are to decide, gentlemen of the jury, is simply not what you would like to see done but what ought to be done according to the oath which you have taken; and whatever your conscience tells you you ought to do, do that, and your verdict will be right.

"I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employes, otherwise it is liable.

150 "Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant, and was found to be in perfect condition, then if within a short time before the accident occurred—if after it left, say some central place, Forrest City or Brinkley, on its road, for some reason—or a short time before it reached here—something unknown or unforseen caused it to become loose, then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order.

"Now, then, that you are to consider.

"If you find that it has exercised due diligence such as any ordinarily reasonable man would exercise in matters of that kind, then it would not be liable.

"But, on the other hand, if they had not, and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employes' safety, regardless of his own diligence; all it under-

takes to do is to keep the machinery and its right of way and place where they work in good and proper order, and use such diligence as a prudent man and careful man would use. And the company is not liable for any defect of which an employe has knowledge at the time."

"You may now retire and consider your verdict."

151 The defendant thereupon asked the Court to instruct the jury as follows:

Defendant's Instructions.

1.

The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It it not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

152 2.

One of the contentions of the defendant in this case is that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The Court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

3.

153 You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon and was injured, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

4.

154 The Court instructs the jury that even though they should believe from the evidence that the step to the pilot was defective and dangerous and that the plaintiff was injured thereby as alleged, yet if the jury believe from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approaching engine and negligently or without ordinary care and caution attempted to step upon the foot-board in question, and in so doing slipped and was run over by the engine and injured, then the plaintiff cannot recover.

And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric head-light which blinded plaintiff, the condition of the track, the fact that plaintiff only had two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

5.

155 The Court instructs the jury that if the plaintiff knew of the condition of the foot-board in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the foot-board, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel then and there duly excepted to the ruling of the Court.

6.

156 The Court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the

place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant.

The Court refused to give said instructions and the defendant, by its counsel then and there duly excepted to the ruling of the Court.

7.

157 The Court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have such knowledge, and if after he observed, or had opportunity to observe, the defect, he was injured at said point by reason of said defect, he cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

8.

158 The Court instructs the jury that if the evidence in this case shows that the plaintiff had, at or before the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

9.

159 The Court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defects in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover.

The Court refused to give said instructions and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

10.

160 The Court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The Court instructs the jury that if they find from the evidence that the defendant's switch yard at the point where plaintiff was injured was in the condition alleged by the plaintiff and had been in the same condition at the time of the injury and for several months prior thereto, and that the plaintiff had been in the defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yards and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant.

And on this point, the Court instruct the jury that the master may conduct his business in his own way although such methods may be more than ordinarily hazardous, and the servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the Court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

11.

161 The Court instructs the jury that even if you find from the evidence that it was necessary for plaintiff to ride upon the steps in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

12.

162 If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from getting or stepping on the front end of engines as they approach them, and that the plaintiff attempted to step on the front end of the engine in violation of said rules and regulations, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

13.

163 If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the foot-board in question as said engine approached him, and in attempting to step upon said foot-board he slipped from said foot-board on to the track and was run over by the said engine, then he is guilty of contributory negligence and cannot recover.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

14.

164 You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were entrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant.

The Court refused to give said instruction and the defendant, by its counsel, then and there duly excepted to the ruling of the Court.

165 These were all of the instructions asked, refused, and given by the Court. The jury retired and upon returning into court awarded the plaintiff a verdict for $5,000.00.

And now comes the defendant, Choctaw, Oklahoma and Gulf Railroad Company, with its bill of exceptions containing all of the evidence, instructions and exceptions saved during the trial, and tenders the same to the Court, praying that the same may be examined, approved, signed and ordered filed and made a part of the record in this case, which is now hereby done.

Witness my hand as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, this the fourth day of June, A. D. 1901.

Signed, JACOB TRIEBER,
U. S. District Judge.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

166 Which Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court, Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff and Defendant in Error,
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant and Plaintiff in Error.

Assignment of Errors.

The said defendant and plaintiff in error, the Choctaw, Oklahoma and Gulf Railroad Company, makes the following assignment of errors in the above-entitled cause:

1. The verdict of the jury is contrary to the instructions of the Court.

2. The verdict of the jury is contrary to the evidence.

3. The verdict of the jury is contrary to the evidence and the instructions of the Court.

4. The Court erred in refusing the peremptory instructions asked by the defendant, which was in words as follows: "The Court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

5. The Court erred in giving that part of its charge to the jury in words as follows: "What it owes to its employes is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in

damages for any injury sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

7. The Court erred in giving that part of its charge to the jury in words as follows: "Now, as a general rule where the tracks are in large railroad yards, where there is a great
167 deal of traffic going on, and where a great many employes walk to and fro in crossing the track, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them."

7. The Court erred in giving that part of its charge to the jury in words as follows: "Contributed in any considerable degree to his injury."

8. The Court erred in giving that part of its charge to the jury in words as follows: "Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad, and he fell and was injured, and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I explained it to you, a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover."

9. The Court erred in permitting the plaintiff to testify as follows:

Q. Do you know anything about the condition of the step before this accident occurred? Immediately before this accident, when this accident occurred, can you say just what condition it was in at that time?

Court: Do you know what condition it was in immediately afterwards?

A. I couldn't say what condition it was in.

Q. Do you know what condition it was in a short time afterward? A. A short time afterward it wasn't there.

Q. Then you don't know the condition of the step at the time of the accident?

A. I can't say what condition it was in.

168 Mr. Blackwood: Did you see it early next morning?

A. Early next next morning I went down and looked at the engine and the piece had been removed.

10. The Court erred in permitting the plaintiff to answer the following questions:

Q. Do you know what is the customary and safe way to fix yards?

A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

11. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. You were on the stand awhile ago. I will ask you when you saw this step next before this accident occurred to Tom Tennessee?

A. I seen it the last trip I was out with the engine and cautioned my brother not to try to catch on that pilot that the foot plate was loose on it.

12. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Could the inspector have found out the condition of the step if he had inspected it?

A. Yes sir.

13. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Did you see it any more after you saw it the next morning after Tom was injured?

A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

Q. Wasn't on there at all? A. No sir.

14. The Court erred in permitting the witness Wesley Graves to testify as follows:

Q. Were you in the habit of doing it?

A. Yes sir, I always do it. I do it up till this day.

15. The Court erred in refusing to permit the witness A. McAvoy to answer the following question:

169 Q. Were those other yards used in the same condition as this yard was used in?

16. The Court erred in permitting the plaintiff to testify as follows:

Q. How were those yards fixed up before they were in general use?

Court: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

A. No sir, they were not allowed to go in.

Court: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed? A. Yes sir.

Court: Can you state that freight trains are not permitted to go into yards until everything is completed?

A. All that I ever seen. They would fill them in and have them ready for use until the tracks were filled in with gravel or something.

Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them? A. No sir.

Court: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

Counsel for plaintiff: You say you have had experience in helping to build at least three yards? A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Two of them were larger and one of them was about the same size.

Q. What was the difference in the ground, or soil? from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

A. No sir, it was solid dirt.

170 Q. Dirt something similar to this over here where this yard was built? A. Yes sir, I suppose so.

Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage or settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it up with gravel.

Court: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track

more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

17. The Court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury
171 happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

18. The Court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions of the defendant in this case is that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The Court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19. The Court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20. The Court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The Court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approach-

ing engine and negligently or without ordinary care and caution, attempted to step upon the foot-board in question, and in doing so slipped and was run over by the engine and injured, then the plaintiff cannot recover."

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric headlight that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

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21. The Court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The Court instructs the jury that if the plaintiff knew of the condition of the foot-board in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said foot-board, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22. The Court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The Court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant."

23. The Court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The Court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

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24. The Court erred in refusing to give defendant's instruction No. 8, in words as follows:

"The Court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25. The Court erred in refusing to give instruction No. 9, ask by the defendant, in words as follows:

"The Court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover."

26. The Court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The Court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The Court instructs the jury that if they find from the evidence that the defendant's
174 switch yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yards and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant."

"And on this point, the Court instructs the jury that the master may conduct his business in his own way although such methods may be more than ordinarily hazardous, and the

servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the Court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27. The Court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The Court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28. The Court erred in refusing to give defendant's instruction No 12, in words as follows:

"If the jury find from the evidence that the railroad
175 company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from getting or stepping on the front end of engines as they approach them and that the plaintiff attempted to step on he front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you wil find for the defendant."

29. The Court erred in refusing to give instruction No. 13, asked by the defendant, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the foot-board in question as said engine approached him, and in attempting to step upon said foot-board he slipped from said foot-board on to the track and was run over by said engine, then he was guilty of negligence and cannot recover."

30. The Court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasona-

ble care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31. The Court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the rec-
176 ord shows that the whole evidence was insufficient to support the allegations of the complaint.

Wherefore, for the reasons above cited, the defendant and plaintiff in error, prays that the judgment rendered in this case be set aside and held for naught.

J. W. McLOUD,
E. B. PEIRCE,
Attorneys for defendant and plaintiff in error.

Filed June 4, 1901. W. P. Feild, Clerk.

Which petition for writ of error and allowance thereof is in the following words and figures to wit:

In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Thomas Tennessee, Plaintiff
vs.
Choctaw, Oklahoma & Gulf Railroad Company, Defendant.

The defendant in the above-entitled cause, the Choctaw, Oklahoma and Gulf Railroad Company, conceiving itself aggrieved by the judgment rendered therein on the 15th day of April, 1901, and the proceedings in said cause, doth hereby pray a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

J. W. McLOUD,
E. B. PEIRCE.
Attorneys for Defendant.

The assignment of errors having been filed with the Clerk of this Court, the writ of error to the U. S. Circuit Court
177 of Appeals for the Eighth Circuit, to review the judgment in the above-entitled cause, is granted and upon the execution of a supersedeas bond in the sum of $6,000 conditioned as required by law, execution on said judgment will be stayed.

JACOB TRIEBER,
U. S. Dist. Judge E. D. of Arkansas.

June 4, 1901.

Filed June 4th, 1901. W. P. Feild, Clerk.

Which supersedeas bond is in the words and figures following to-wit:

178 Know all men by these Presents, That we, Chas T. Abeles, S. P. Scott, are held and firmly bound unto Thomas Tennessee in full and just sum of six thousand dollars, to be paid to the said Thomas Tennessee his heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 4th day of June in the year of our Lord one thousand nine hundred and one.

Whereas, lately at the April term A. D. 1901, of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in a suit depending in said Court between Thomas Tennessee plaintiff and Choctaw, Oklahoma and Gulf Railroad Company defendant a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company and the said Choctaw, Oklahoma and Gulf Railroad Company has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Tennessee citing and admonishing him to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

(Signed) CHOCTAW, OKLAHOMA & GULF RAILROAD CO.,
By E. B. PEIRCE, its atty. [Seal]
CHAS. T. ABELES, [Seal]
S. P. SCOTT, [Seal]

Approved by
JACOB TRIEBER,
U. S. Dist. Judge, East. Dist. Ark.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

179 Which citation is as follows, to wit:

180 The United States of America, to Thomas Tennessee—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth

Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber District Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this fourth day of June in the year of our Lord one thousand nine hundred and one.

JACOB TRIEBER,
United States District Judge,
For the Eastern District of Arkansas.

Service acknowledged this 4th day of June, 1901.
BLACKWOOD & WILLIAMS
& J. W. HOUSE,
Attys for defendant in error.

Indorsed: Filed June 4, 1901. W. P. Feild, Clerk.

181 United States of America, Western Division of the Eastern District of Arkansas.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the original remaining of record in my office, and constitute a true copy of the record and of the assignment of errors and of all proceedings in case of Thomas Tennessee vs. Choctaw, Oklahoma & Gulf Railroad Company.

The seal of the Circuit Court U. S. A. Western Division of East Dist. Ark.

In witness whereof, I have hereunto set my hand and the seal of said Court, this second day of July in the year of our Lord, one thousand nine hundred and one and of the Independence of the United States of America, the one hundred and twenty-sixth.

Attest: W. P. FEILD, Clerk.

Filed Jul. 25, 1901. John D. Jordan, Clerk.

(*Appearance for Plaintiff in Error.*)

And on the twenty-ninth day of July, A. D. 1901, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter our appearance as counsel for the plaintiff in error.

J. W. McLOUD.
E. B. PEIRCE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Jul- 29, 1901, John D. Jordan, clerk. J. W. McLoud, E. B. Peirce, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the thirteenth day of September, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD CO., Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the defendant in error.

JOHN W. BLACKWOOD.
J. E. WILLIAMS.
J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Sep. 13, 1901. John D. Jordan, clerk. John W. Blackwood, J. E. Williams, J. W. House, counsel for def't in error.

(*Appearance for Defendant in Error.*)

And on the eighteenth day of September, A. D. 1901, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the defendant in error.

J. W. HOUSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma and Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Sep. 18, 1901, John D. Jordan, clerk. J. W. House, counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the sixth day of January, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. B. STUART.

(Endorsed:) U. S. circuit of appeals, eighth circuit. No. 1624. The Choctaw, Oklahoma & Gulf Railroad Co., pl'ff in error, *vs.* Thomas Tennessee. Appearance. Filed Jan. 6, 1902. John D. Jordan, clerk. C. B. Stuart, counsel for pl'ff in error.

(*Order of Submission.*)

And on the seventh day of January, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

TUESDAY, *January* 7, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE.
} No. 1624.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. E. B. Peirce in behalf of the plaintiff in error; continued by Mr. J. W. House for the defendant in error and concluded by Mr. C. B. Stuart for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-fourth day of April, A. D. 1902, an opinion of said circuit court of appeals was filed in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1901.

THE CHOCTAW, OKLAHOMA & GULF Railroad Company, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.
} No. 1624. In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Mr. E. B. Peirce and Mr. Charles B. Stuart (Mr. J. W. McLoud was with them on the brief) for plaintiff in error.

Mr. J. W. House (Mr. J. E. Williams and Mr. J. W. Blackwood were with him on the brief) for defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

This is an action for personal injuries which was brought by Thomas Tennessee, the defendant in error, a brakeman in the employ of the Choctaw, Oklahoma & Gulf Railroad Company, against that company. The injury complained of was sustained on February 6, 1900, at Argenta, Arkansas, near Little Rock, at which place the company had an extensive yard for parking and making up freight trains. The plaintiff below was head brakeman on a freight train of the defendant company, which arrived at this yard about ten

o'clock p. m. on the night of the accident, having come from Memphis, Tennessee. As it headed into the yard, the plaintiff descended from the engine and threw, in succession, two switches to let the train in onto the lead track and to the particular side track where it was to stand for the night. After throwing the last switch, being in front of the engine, he attempted to board the pilot of the engine for the purpose of riding down into the lower part of the yard, to see that the switches were lined up and to be in a convenient position to open or close them readily, if they were not properly lined up. In his attempt to board the pilot, he stepped on an iron step or stirrup, which was bolted to the bottom of the pilot or cow-catcher, about six or eight inches from the point thereof, when, as he claimed, the stirrup gave away and his foot went down between the ties which, at that point, were not filled in, the result being that his leg was run over and crushed and had to be amputated. He charged, as negligence on the part of the company, the defective condition of this stirrup and the fact that the track was not filled in between the ties as it ought to have been, by reason of which defect his foot was caught or wedged in under one of the ties, so that he could not extricate it. The case was submitted to the jury and there was a verdict and judgment below in favor of the plaintiff, to reverse which the defendant company sued out a writ of error.

One of the errors assigned is that the trial court refused to withdraw the case from the jury, as it was requested to do, and as this contention presents the principal question in the case, we are compelled to state the substance of the testimony which was adduced at the trial. The plaintiff's witnesses, including the plaintiff, who was one of the principal witnesses, testified to the following effect: That the proper position for a head brakeman on a freight train, when it is running into yards like the one at Argenta, is on the front of the engine, to enable him to line up the switches promptly, as they are encountered, and prevent derailments; that the pilots of freight engines are provided with foot plates or stirrups on which it is customary for the head brakeman to stand for that purpose; that the engine which he attempted to board, on the occasion of the accident, was provided with such a foot plate; that he had never received instructions not to ride on the front end of the engine, in the manner described, but, on the contrary, had often been commanded by conductors to so ride; that the only rule, on the subject, which had been prescribed by the defendant company, that he ever saw, was a rule warning its employees not to jump on or off an engine when it was running "*at a high rate of speed*"; that on the occasion of the accident the engine was moving very slowly, not more than four miles an hour; and that when the plaintiff attempted to board the engine and was hurt, he was discharging his duties in the proper and customary manner, as all other employees under like circumstances were in the habit of discharging them.

With reference to the condition of the stirrup on the pilot, the evidence elicited from the plaintiff was that "it gave way or went down" when he stepped on it and that his foot was wedged in under one of the ties (the space between the ties not being filled in), so that

he could not extricate it in time to prevent being run over; while another witness testified that this stirrup on the pilot was in a defective condition, being so loose three or four days prior to the accident, that he had at that time warned a fellow-brakeman not to step on it because of the condition it was then in. The plaintiff, testifying in his own favor, denied having any knowledge that the stirrup was out of repair and defective, before the accident occurred.

The testimony relating to the condition of the yard tracks and the plaintiff's knowledge of their condition, was to the following effect: The yard had been constructed during the months of October, November and December, 1899, and was of large dimensions, consisting of ten or twelve long tracks laid side by side, which branched off from a lead track surrounding the yard. The defendant company began to use this yard to park and make up its trains late in the month of December, 1899. On account of physical disability the plaintiff laid off and did not work for the company during the month of January, 1900, and, as he testified, had not been in this yard save on two or three occasions prior to the accident. On these occasions he was either in the yard about daylight in the morning to help take out his train, after it was made up, or when it headed into the yard about nine or ten p. m., as on the evening of the accident, on the return of the train from Memphis. He had never been on track No. 3, where he was hurt, until the evening of the accident, and he denied having any information concerning the condition of that track, prior to being injured, or any knowledge concerning the condition of the tracks generally, save such as was acquired by a casual glance on the two or three occasions aforesaid when he was in the yard or when he was passing in proximity to it on the main track and was at the time in the discharge of his ordinary duties. The spaces between the ties of track No. 3 and in the yard generally, had not been filled in with earth, although it is customary to fill in between the ties and make the surface of the ground as level as possible in depot yards where much switching is to be done. The plaintiff testified that if the track had been filled in his foot would not have been caught and that he could have extricated himself when the stirrup on the pilot gave way. On the other hand, the defendant produced evidence which tended to show that while it is customary to surface up the tracks in depot yards, by filling in between the ties, yet, as this was a new yard, it was in the condition in which newly constructed yards are usually left for some time, to permit the water to drain out.

Such being the character of the evidence that was adduced on the trial, we think that the case could not have been lawfully withdrawn from the jury without usurping its functions. The testimony manifestly tended to show that the stirrup in question had been in a defective condition for some days prior to the accident and that the defect in the stirrup was a proximate cause of the injury. Moreover, in view of its location and the use that was made of it by brakemen, the jury were doubtless warranted in finding that, in the exercise of ordinary care, the defect should have been discovered by the defendant and repaired prior to the accident. We also think

that because of the location of the track, where the accident occurred, and the use that was made of it, for switching purposes and to assemble trains, that it was the province of the jury to decide whether it was in a fit condition for the uses to which it was devoted and whether the defendant company was chargeable with any want of ordinary care or diligence in that respect. These were questions, as we think, respecting which reasonable men might entertain different opinions and such being the fact, it was the province of the jury to determine them.

Counsel urge, however, that the plaintiff ought not to have made the attempt to board the engine while it was in motion and that because he did so the trial court should have declared as a matter of law, that he was guilty of contributory negligence and could not recover. But this contention ignores important evidence, which this record contains, showing that this stirrup on the pilot was placed there for the express purpose of enabling brakemen to board the engine and stand on the pilot; that brakemen were in the habit of thus boarding engines when they were moving slowly, and standing on the stirrup; that no rule of the company, known to the plaintiff, had ever forbidden such acts prior to the accident; that the plaintiff had, at times, been ordered by conductors, under whom he worked, to place himself in that position for the purpose of lining up switches or doing other necessary acts; and that he was in the proper and customary discharge of his duties when he was injured. Under the circumstances, it was not the duty of the court to decide, as a matter of law, that the plaintiff was guilty of contributory negligence in attempting to step on the pilot of the engine when it was in motion but its obvious duty was to submit that issue to the jury, leaving them to determine, in the light of all the evidence, whether he was guilty of such an act of negligence as should preclude him from recovering. The placing of this stirrup on the engine was an invitation to brakemen to stand thereon. It was placed there for that purpose, as the defendant company concedes; while its rule warning employees against jumping on engines when moving at "a high rate of speed" impliedly permitted them to do so when they were moving slowly. Besides, if the testimony of the plaintiff is credited, it was his duty to stand on this foot plate as the train moved slowly down into the yard, to observe the condition of switches and be in a position to close them promptly and prevent a derailment, if any were found open.

Counsel for the defendant company have called our attention to a number of well-known cases in support of their contention that the plaintiff was guilty of contributory negligence in attempting to get on the pilot with a view of riding thereon, when the train was moving, but we think that the case in hand is distinguishable therefrom by the facts and circumstances to which we have alluded, and that if the plaintiff might have been found guilty of contributory negligence, it was, in this instance, the province of the jury, rather than the duty of the court, to make that finding.

We conclude, therefore, that no error was committed by the trial court in submitting the case to the jury.

The charge of the lower court is criticized because in one or two places the language which was employed, when considered by itself, might be understood to mean that a master is bound at all events to furnish machinery etc., which is reasonably safe, whereas the law is that he is only required to exercise reasonable and ordinary diligence in that behalf, the duty not being imperative or absolute. For example, the court said, in one place, "the duty which a railroad company * * * owes to its employees is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work." It neglected to say that it is the duty of a railroad company to exercise reasonable care in the matter of providing machinery. Whatever error there may have been, in these respects, was cured, we think, by other portions of the charge, particularly by the concluding paragraphs thereof, where the court clearly specified the degree and kind of diligence which the defendant company ought to have exercised in providing machinery and appliances, telling the jury, in substance, with respect to the stirrup, which was the only appliance complained of, that if it had been inspected at proper and suitable times, by the defendant, and was found to be in good condition, and that if it had become loose, for some unforeseen or unknown cause, shortly before the plaintiff was hurt, that the defendant could not be found guilty of negligence, because of the defect in the stirrup, since in that event it would have exercised due diligence. In the same connection, the jury were instructed, in substance, that if the stirrup had become loose so long prior to the accident that, by the exercise of reasonable or ordinary diligence, the defendant could have discovered it and repaired it, then and in that event it might be deemed guilty of negligence. The jury were also instructed that the master is not the insurer of his servants' safety and that all he undertakes to do is to keep the machinery, which he uses, in proper order and repair and to use such diligence in that behalf as a prudent and careful man would use. The rule, as heretofore declared by this and other courts, being that a judgment will not be reversed on account of the failure to use some qualifying word or phrase in some clause of the charge, when the charge, considered as a whole, states the law applicable to the case correctly (*Western Coal & Mining Co., v. Ingraham*, 17 C. C. A. 71, 70 Fed. Rep. 219; *Portland Gold Mining Co. v. Flaherty*, — C. C. A. —, 111 Fed. Rep. 312; *Third Ave. R'y Co., v. Krausz*, — C. C. A. —, 112 Fed. Rep. 379) it follows that the error above mentioned, in view of what was said in other parts of the charge, cannot be regarded as a material error, such as would warrant a reversal.

Complaint is also made because the lower court charged the jury, in substance that in large railroad yards where there is much traffic and many employees, a railroad company is required to exercise more diligence and keep its tracks in better condition than it would out in the country, but we have been unable to discover any material error in this instruction. The court obviously meant that in railroad yards, where trains are made up and much switching and coupling is done, railroad companies ought to exercise greater care,

in keeping the space between its ties filled up and the ground level and free from obstructions or pitfalls, than in other places along its line, where there is less occasion to make couplings. As thus understood—and the instruction is not fairly susceptible of a different interpretation, as applied to the facts of this case—it was correct.

In another part of the charge the lower court said, concerning the plaintiff, "if he was careless himself, if the want of attention to his own safety contributed *in any considerable degree to his injury*, the railroad company is not liable;" and this statement of the law forms the subject-matter of another exception, which would have been tenable were it not for the fact that the court, in the same connection, specified the particular acts which would amount to contributory negligence, and preclude the plaintiff from recovering, telling the jury, in substance, that an employee cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which said exposure contributed; that "if the plaintiff had no business to get on that foot plate (meaning, of course, the stirrup which gave way), but his duty was to jump on the back step or the step back of the engine, which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not." We are of opinion that this statement, by the trial judge, sufficiently advised the jury of the nature of the acts, which if committed by the plaintiff would amount to contributory negligence—to prevent the instruction, which is criticized, from misleading the jury and to deprive the exception, which is now under consideration, of any merit.

In the course of the trial a witness for the plaintiff, who had testified that the step on the pilot was loose three or four days before the accident, and that he had warned one of his fellow-brakemen not to step on it, was asked whether he saw the step the morning after the accident and he replied that he went down the next morning and looked at the engine and the piece had been removed. The defendant company objected to the latter part of this answer on the general ground that it was "incompetent, irrelevant and immaterial to any issue in the case" and an exception was saved. It is manifest, we think, that this question was not asked by counsel for the plaintiff with a view of showing that the alleged defect was repaired by the master after the accident had occurred, which class of testimony is generally inadmissible. Counsel obviously had no such purpose in view. The witness was asked if he saw the step the morning after the accident, evidently with a view of inquiring further what condition it was then in and he replied casually that the morning after the accident it had been removed, which may have meant that it was torn off when the plaintiff stepped on it and was not on the pilot the next morning. Besides, the court instructed the jury that if any evidence had been introduced showing that subsequent to the accident the defendant repaired the step on the pilot or filled in the spaces between the ties, that such testimony should not be considered by the jury, as any evidence that such action should have been

taken before the accident occurred. It is clear, therefore, that the exception last specified is of no moment and should be disregarded.

Several other exceptions were taken during the trial and are embraced in the assignment of errors, all of which have been considered and found to be without merit. Most of these exceptions have not been argued by counsel but our attention has simply been directed to them in the brief. The case seems to have been fairly and thoroughly tried. The instructions, in all material respects, were as favorable to the defendant as could have been desired, except that the court declined to withdraw the case from the jury, holding that there were issues of fact in the case which ought to be determined by the jury, and in this respect its action was right. The judgment below is accordingly

Affirmed.

SANBORN, *Circuit Judge*, dissenting:

The alleged causes of action in this case were the failure of the railroad company to exercise ordinary care to properly ballast its tracks and to inspect and keep the step on the bottom of the cowcatcher in repair. In regard to these subjects the court below instructed the jury in three different places in its charge that the law imposed upon the railroad company the absolute duty to furnish its employés a reasonably safe place to work and reasonably safe machinery with which to discharge their duties. These three declarations, one of which was delivered early in the charge, one when the court had delivered about one-third of it, and the last near its close, read in this way:

1. "What it owes to its employés is to furnish machinery in a reasonably safe condition, and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

2. "Now as to the condition of the track where the accident occurred, if the railroad company failed to keep the track in a reasonably safe condition and by reason of that failure the plaintiff, by no negligence of his own, sustained the injury complained of, then it is liable."

3. "I want to state this. It is the duty of a railroad corporation, or any other employer or person, especially where there is machinery, as I told you at the start, to furnish reasonably safe appliances to its employés, otherwise it is liable."

Here were three erroneous declarations of the law controlling the rights of the parties in this litigation. They were not trivial and inadvertent mistakes in the use of words or terms, but solemn and thoughtful declarations of the rule of law which the court clearly intended should control, and which doubtless did govern the jury in its deliberations.

That they were erroneous the following authorities demonstrate: *Choc., Okla. & Gulf R. R. Co., v. Holloway*, — Fed. —; *Railway Co., v. Jarvi*, 3 C. C. A. 433, 435, 436, 53 Fed. 65, 67, 68; *Gowen v. Har-*

ley, 6 C. C. A. 190, 197, 56 Fed. 973, 980; *Railway Co., v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45, 48; *St. Louis, I. M. & S. R'y Co., v. Needham*, 69 Fed. 823, 825, 16 C. C. A. 457, 459; *Louisville & N. R. Co., v. Johnson*, 81 Fed. 679, 680, 27 C. C. A. 367, 368; *Railroad Co., v. Myers*, 11 C. C. A. 439, 63 Fed. 793; *id.* 22 C. C. A. 269; 76 Fed. 443.

The presumption is that error produces prejudice. It is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice, and could not have prejudiced the complaining party that the rule that error without prejudice is no ground for reversal, is applicable. *Choc., Okla. & Gulf R. R. Co., v. Holloway*, — Fed. —; *National Masonic Acc. Ass'n v. Shryock*, 20 C. C. A. 3, 11, 73 Fed. 774, 781; *Atchison, T. & S. F. R'y Co., v. McClurg*, 8 C. C. A. 322, 325–'6, 59 Fed. 860, 863; *Deery v. Cray*, 5 Wall. 795, 807–'8; *Smiths v. Shoemaker*, 17 Wall. 630, 639; *Moores v. Bank*, 104 U. S. 625, 630; *Gilmer v. Higley*, 110 U. S. 47, 50; *Vicksburg & Meridian Railroad Co., v. O'Brien*, 119 U. S. 99, 103; *Mexia v. Oliver*, 148 U. S. 644, 673; *Boston & Albany Railroad Co., v. O'Reiley*, 158 U. S. 334, 337; *Peck v. Heurick*, 167 U. S. 624, 629.

It is true that while the court gave the erroneous rule of law to the jury three times at three different places in its charge, it also gave the true rule once. But this neither extracted the error nor proved that this error could not have prejudiced the railroad company. The presumption, as we have seen, is that this error of law did produce prejudice unless the contrary clearly appears beyond doubt. It cannot so appear either beyond doubt or by a preponderance of evidence where the court repeats the error twice and gives the true rule but once. Where two contradictory rules are given to the jury by the charge of the court for their guidance in determining the crucial issues of a controversy, as in the case at bar, it is impossible for an appellate court to ascertain or to know by which the jury were governed in their decision of the issues and the presumption that error produces prejudice must prevail. The vice of a wrong rule is not extracted by giving a right rule, because it is impossible to tell which influenced the jury. *St. Louis, I. M. & S. R'y Co. v. Needham*, 52 Fed. 371, 377, 3 C. C. A. 129, 147; *St. Louis & S. F. R'y Co. v. Farr*, 6 C. C. A. 211, 216, 217, 56 Fed. 994, 1000.

There was another error in the charge. It consisted in the instruction that the negligence of the plaintiff was a bar to his recovery if that negligence contributed in any considerable degree to his injury when the law was that it constituted a bar if it contributed in any degree. On account of these palpable errors in the charge of the court the judgment below should be reversed and a new trial should be directed.

Filed April 24, 1902.

(*Judgment.*)

And on the twenty-fourth day of April, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1901.

THURSDAY, *April* 24, 1902.

THE CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE. } No. 1624.

In error to the circuit court of the United States for the eastern district of Arkansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be, and the same is hereby, affirmed with costs; and that Thomas Tennessee have and recover against the Choctaw, Oklahoma and Gulf Railroad Company the sum of twenty dollars for his costs herein and have execution therefor.

April 24, 1902.

(*Petition for Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a petition for writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.

Petition for writ of error.

To the honorable Chief Justice and associate justices of the Supreme Court of the United States:

Your petitioner respectfully shows that it is a corporation organized under an act of the Congress of the United States, entitled, "An act to authorize the purchasers of the property and franchises of the Choctaw Coal & Railway Company to organize a corporation and confer upon the same all the powers, privileges and franchises vested in that company," which was approved August 24th, 1894, and the acts supplemental thereto, approved on April 24th, 1896, entitled, "An act to amend an act approved August 24th, 1894, entitled, 'An act to authorize the purchasers,'" etc., and the act approved March 28th, 1900, entitled, "An act enlarging the powers of the Choctaw, Oklahoma and Gulf Railroad Company;" that by the judgment

heretofore rendered by the said United States circuit court of appeals for the eighth circuit, in the above-entitled cause, manifest error has happened, to the great damage of your petitioner, in this: That a great and manifest error at law occur-ed at the trial of the said cause against the objection of your petitioner, and to its great damage, all of which will more fully appear by the record of said court in said cause.

Your petitioner further shows that this is not a case in which the jurisdiction is dependent upon the opposite parties to the suit or controversy being aliens or citizens of the United States, or citizens of different States, nor a case arising under the patent laws, or under the revenue laws, or under the criminal laws, nor an admiralty case; and that the matter in controversy exceeds one thousand dollars besides costs.

Wherefore, your petitioner prays your honors to allow a writ of error from the Supreme Court of the United States to be directed to the said United States circuit court of appeals for the eighth circuit, whereby, under the seal of said United States circuit court of appeals for the eighth circuit, the record and proceedings aforesaid, with all things concerning the same, may be transmitted to the Supreme Court of the United States with the writ of error, and that the record and proceedings aforesaid being inspected, the Supreme Court of the United States will cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Petition for writ of error. Filed May 26, 1902, John D. Jordan, clerk.

(*Bond on Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a bond on writ of error was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the Supreme Court of the United States.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY, Plaintiff in Error,
vs.
THOMAS TENNESSEE, Defendant in Error.

Know all men by these presents—that we, Choctaw, Oklahoma and Gulf Railroad Company, as principal, and Allen N. Johnson and Chas. F. Penzel, as sureties, are held and firmly bound unto the defendant in error, Thomas Tennessee, in the full and just sum of

eight thousand ($8000.00) dollars, to be paid to the said defendant in error, Thomas Tennessee, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this the — day of May, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a circuit court of appeals of the United States for the eighth circuit, in a suit depending in said court, between Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, and Thomas Tennessee, defendant in error, a judgment was rendered against the said Choctaw, Oklahoma and Gulf Railroad Company, and the said Choctaw, Oklahoma and Gulf Railroad Company, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Thomas Tennessee, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof,

Now, the condition of the above obligation is such, that if the said Choctaw, Oklahoma and Gulf Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its said plea good, then the above obligation to be void; else to remain in full force and virtue.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY,
By J. W. McLOUD, *General Solicitor.* [SEAL.]
ALLEN N. JOHNSON. [SEAL.]
CHAS. F. PENZEL. [SEAL.]

Sealed and delivered in presence of—
E. B. PEIRCE.

Approved by:
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

May 23, 1902.

This bond is good & acceptable to defendant in error.
BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Att'ys for Def't in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Bond. Filed May 26, 1902, John D. Jordan, clerk.

(*Assignment of Errors.*)

And on the twenty-sixth day of May, A. D. 1902, an assignment of errors was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

Q. Could the inspector have found out the condition of the step if he had inspected it?

A. Yes sir.

13. The court erred in permitting the witness Wesley Graves to testify as follows:

Q. Did you see it any more after you saw it the next morning after Tom was injured?

A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

Q. Wasn't on there at all?

A. No sir.

14. The court erred in permitting the witness Wesley Graves to testify as follows:

Q. Were you in the habit of doing it?

A. Yes sir, I always do it. I do it up till this day.

15. The court erred in refusing to permit the witness A. McAvoy to answer the following question:

Q. Were those other yards used in the same condition as this yard was used in?

16. The court erred in permitting the plaintiff to testify as follows:

Q. How were those yards fixed up before they were in general use?

COURT: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

A. No sir, they were not allowed to go in.

COURT: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed?

A. Yes sir.

COURT: Can you state that freight trains are not permitted to go into yards until everything is completed?

A. All that I ever seen. They would fill them in and have them ready for use until the tracks were filled in with gravel or something.

COURT: State in what manner you helped. Did you superintend the building of them, laying them out and planning them?

A. No sir.

COURT: Just worked as a common laborer?

A. I worked as a common laborer and helped lay steel and ties.

COUNSEL FOR PLAINTIFF: You say you have had experience in helping to build at least three yards?

A. Yes sir.

Q. Were they larger or smaller than the yards over here?

A. Two of them were larger and one of them was about the same size.

Q. What was the difference in the ground, or soil? from which these yards were built and the soil here?

A. There wasn't any. It was all graded down.

Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

A. No sir, it was solid dirt.

Q. Dirt something similar to this over here where this yard was built?

A. Yes sir, I suppose so.

Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage of settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation, do you know anything about that?

A. Yes sir.

Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

A. I have worked several gangs on the tracks that way myself and I always would fill in the track and fill it up with gravel.

COURT: The question is about a new yard.

A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties.

17. The court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured, and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step.

18. The court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions of the defendant in this case is, that there was no defect in the step which the plaintiff alleges caused the injury. The contention of the defendant is, that the step was in a sound condition and perfectly safe. The court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason

of his foot's slipping or by reason of having lost his balance, or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19. The court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20. The court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary case and caution got upon defendant's track, or on the side thereof, in front of the approaching engine, and negligently or without ordinary care and caution, attempted to step upon the footboard in question, and in doing so slipped, and was run over by the engine and injured, then the plaintiff cannot recover."

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric head-light that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would thereby be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

21. The court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The court instructs the jury that if the plaintiff knew of the condition of the footboard in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said footboard, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occur-ence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22. The court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's road-bed at the place of the injury, and if you find from the evidence that the alleged condition of the cross-ties produced the injury, you will find for the defendant."

23. The court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The court instructs the jury that the plaintiff was bound to

notice the defect in the track of which he complains *if*, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

24. The court erred in refusing to give defendant's instruction No. 8, in words as follows:—

"The court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25. The court erred in refusing to give instruction No. 9, asked by the defendant, in words as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to attempt to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, the plaintiff was guilty of contributory negligence and cannot recover."

26. The court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The court instructs the jury that one of the alleged grounds of negligence upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch-yard had not been filled in and that they were standing some fifteen inches above ground. The court instructs the jury that if they find from the evidence that the defendant's switch-yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch-yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch-yard and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant."

"And on this point, the court instructs the jury that the master may conduct his business in his own way, although such methods may be more than ordinarily hazardous, and the servant assumes

the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27. The court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28. The court erred in refusing to give defendant's instruction No. 12, in words as follows:

"If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakeman, which warns and prohibits them from getting or stepping on the front end of engines as they approach them and that the plaintiff attempted to step on the front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant."

29. The court erred in refusing to give instruction No. 13, asked by the defendant, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the footboard in question as said engine approached him, and in attempting to step upon said footboard he slipped from said footboard onto the track and was run over by said engine, then he was guilty of contributory negligence and cannot recover."

30. The court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury that its condition could have been discovered by the defendant, or its inspectors, by the exercise of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31. The court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the record shows that the whole evidence was insufficient to support the allegations of the complaint.

Third. The said circuit court of appeals, before which was heard the writ of error which brought up the record in this action from the circuit court of the United States for the western division of the eastern district of Arkansas to said circuit court of appeals, erred in making its order affirming the judgment of said circuit court of the United States, and directing a mandate to issue to the circuit court of the United States for the western division of the eastern district of Arkansas, directing the said circuit court of the United States to proceed in accordance with the decision and order of said circuit court of appeals.

Fourth. That the said circuit court of appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said circuit court of the United States and in not directing a new trial of the issues raised by the pleadings in said action; and the said Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, prays that the judgment aforesaid entered herein in the circuit court of appeals and in the circuit court of the United States for the western division of the eastern district of Arkansas, and the order entered herein as aforesaid by the circuit court of appeals, and the judgment of affirmance to be entered in the said circuit court of the United States for the western division of the eastern district of Arkansas upon said order of affirmance, for the errors aforesaid, and for other errors in the record and proceedings aforesaid, be reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by occasion of said judgment and order.

J. W. McLOUD,
C. B. STUART,
E. B. PEIRCE,
Attorneys for Plaintiff in Error.

(Endorsed:) No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Assignment of errors. Filed May 26, 1902, John D. Jordan, clerk.

(*Writ of Error.*)

And on the twenty-sixth day of May, A. D. 1902, a writ of error was filed in the clerk's office of said circuit court of appeals in said cause, the original of which is hereto attached and herewith returned.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals before you, or some of you, between The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, and Thomas

Tennessee, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23rd day of May, in the year of our Lord one thousand nine hundred and two.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Writ of error. Filed May 26 1902 John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, } ss:
Eighth Circuit, }

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name, and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this thirty-first day of May, A. D. 1902.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(*Citation.*)

And on the twenty-eighth day of May, A. D. 1902, a citation was filed in the clerk's office of said circuit court of appeals in said cause, the original of which with the acceptance of service endorsed thereon is hereto attached and herewith returned.

UNITED STATES OF AMERICA, *ss:*

To Thomas Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein The Choctaw, Oklahoma & Gulf Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 23rd day of May, in the year of our Lord one thousand nine hundred and two.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

I hereby accept service of the within citation this the 27th day of May, 1902.

BLACKWOOD & WILLIAMS,
J. W. HOUSE,
Counsel for Defendant in Error.

[Endorsed:] No. 1624. The Choctaw, Oklahoma & Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Citation. Filed May 28, 1902. John D. Jordan, clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred fifty-five pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said circuit court of appeals in a certain cause wherein The Choctaw, Oklahoma and Gulf Railroad Company was plaintiff in error, and Thomas Tennessee was defendant in error, No. 1624, December term, 1901, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation with acceptance of

service thereon and the original writ of error with my return thereto are hereto attached and herewith returned.

I do further certify that a copy of the writ of error is lodged in my office for the use of the defendant in error.

In testimony whereof, I hereunto subscribe my name and affix the seal of said circuit court of appeals, at the city of St. Louis, Missouri, in the eighth circuit, this thirty-first day of May, A. D. 1902.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 18579. U. S. C. C. of appeals, 8th circuit. Term No. 351. The Choctaw, Oklahoma and Gulf Railroad Company, plaintiff in error, *vs.* Thomas Tennessee. Filed June 10, 1902.

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JAMES H. McKENN

Supreme Court of the United States

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY.. .. .. *Plaintiff in Error.*

v. No. ~~251~~ 67

THOMAS TENNESSEE.. .. .. .. *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

EDWARD B. PEIRCE,
Attorney for Plaintiff in Error.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

Supreme Court of the United States

CHOCTAW, OKLAHOMA AND GULF
RAILROAD COMPANY.. .. .. *Plaintiff in Error.*

v. **No. 351**

THOMAS TENNESSEE.. .. .. .. *Defendant in Error.*

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

This case was originally instituted in the Circuit Court of Pulaski County, Ark., and removed by the defendant to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, on the ground of the Federal character of the defendant company (Tr., pp. 5, 6).

The **COMPLAINT** (Tr., p. 3) charged that on the 6th day of February, 1900, the plaintiff was engaged as a brakeman on a freight train of the defendant, and was engaged

in his duty as such in the town of Argenta, Ark., and as such was riding on the front end of the engine of freight train No. 13, headed into the yards of said railroad.

That at the place where plaintiff was then engaged in the performance of his duty, there was a step on what is known as the "cowcatcher," where plaintiff, in the performance of his duty, was accustomed to step; that in the performance of said duty, he placed his foot upon said step, and the said step, by reason of being in a weak or unstable condition, gave way and thereby precipitated him onto the ground, where he became entangled in the ties of said railroad company and the said train ran over his left leg and bruised and mangled the same, so that he was compelled to have it amputated near the body.

That the defendant was negligent in the construction of said step, and was negligent in permitting it to stay in a faulty and unfirm condition; that the condition of said step was unknown to this plaintiff.

That said railroad was operating said train over a track where the ties stood up some fifteen inches from the ground, and thus made a mantrap into which plaintiff was thrown; that if said ties had been properly filled in when plaintiff fell onto the track of same, he might have escaped uninjured, but by reason of the negligent construction of said track, plaintiff was caught in between the same and thereby suffered the loss of his leg as aforesaid. The plaintiff was just beginning to run into the new yard and upon the new track, and its dangerous condition was unknown to plaintiff.

That by reason of the negligence of the defendant, plaintiff suffered great bodily suffering and severe mental anguish, and lost the use of his limb, to his damage in the sum of Five Thousand Dollars.

The **ANSWER** (Tr., p. 9) specifically denied each of the material allegations of the complaint, and in addition thereto, alleged that plaintiff was attempting to step upon the front end of said engine, and that the act of attempting to ride upon said front end of said engine was unnecessary, careless and improper on the part of said plaintiff, and in the discharge of his duty he was not required, nor was it necessary for him to attempt to so ride, and in attempting to do so he was violating the rules of the said defendant company; and further that if the plaintiff was injured as alleged in his complaint, said injury was occasioned by his own carelessness and negligence and without any fault on the part of the defendant.

STATEMENT OF FACTS.

The record in this case disclosed that about the 1st of December, 1899, the Choctaw, Oklahoma and Gulf Railroad Company took possession of and commenced to operate what had prior thereto been known as the Memphis and Little Rock Railroad, running from Little Rock to Memphis. About this time, there was a general reconstruction of the line, such as putting in new yards, enlarging terminal facilities, working on many of the bridges, widening and raising the dumps; in fact, so extensive were the improvements begun, that it practically resulted in making a new road from Memphis to Little Rock. Among these improvements was the enlargement of the terminal facilities in that part of Little Rock known as Argenta. This particular work consisted principally in laying out and constructing an entirely new yard, which is shown on the blue-print (Tr., pp. 66, 67), and explained by witness McAvoy in his testimony (Tr., pp. 64, 65). These new yards had been laid out, the rails had been

spiked to the cross-ties, and the tracks surfaced up, but the spaces between the ties had not yet been filled in. The road began to use this new yard about the middle of December, 1899.

Among the persons employed by the plaintiff in error was the defendant in error, Thomas Tennessee, who was thirty-three years old. He had been engaged in railroading for twelve or fifteen years in the capacity of brakeman and switchman, and during that time had worked for seventeen or eighteen different roads. On the night of February 6, 1900, he was employed as head brakeman on Train No. 13, which was the local freight running that day from Hopefield, opposite Memphis, to Little Rock. This train arrived in the yards at Argenta at about 10 o'clock at night. Tennessee alighted from the train and went forward to turn the switch from the main track to the lead track of the new yards. It was his business to find a track in the yards to head his train on. He passed down in front of the engine until he came to the third track, and decided to put his train in on that track. He "lined" up the third track to the lead track, and signaled the engineer to come ahead. The engine was equipped with an electric headlight, which was very brilliant, and Tennessee stated that it blinded him. Tennessee also had his lantern in his hand, and after he had signaled the train to come ahead, took his position just inside of the rail, pulled his hat down over his eyes to keep the electric headlight from blinding him, so that the line of his vision was brought just about the top of the pilot of the engine. He took this position to get on a small iron step, four inches wide by eighteen inches long, bolted to the bottom of the pilot or cowcatcher, on the right-hand, or engineer's side, of the engine, and slanting across the

track with the pilot, as the engine approached him. As the engine approached, Tennessee attempted to get on, but for some reason or other, did not succeed, and he fell just in front of the engine, and his left leg was caught and bruised and mangled, so that he was compelled to have it amputated. Upon a trial of the case, the jury returned a verdict in favor of the plaintiff for $5,000.

ASSIGNMENT OF ERRORS.

The plaintiff in error relies upon the following errors for the reversal of this case:

1.

The verdict of the jury is contrary to the instructions of the court.

2.

The verdict of the jury is contrary to the evidence.

3.

The verdict of the jury is contrary to the evidence and instructions of the court.

4.

The court erred in refusing the peremptory instruction asked by the defendant, which was in words as follows: "The court instructs the jury that under the evidence in this case the plaintiff cannot recover and your verdict will be for the defendant."

5.

The court erred in giving that part of its charge to the jury in words as follows: "What it owes to its employees is to furnish machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable

in damages for any injury sustained by the servant while in the discharge of his duties if the servant's own acts or negligence do not contribute to the accident."

6.

The court erred in giving that part of its charge to the jury in words as follows: "Now, as a general rule where the tracks are in large railroad yards, where there is a great deal of traffic going on, and where a great many employees walk to and fro in crossing the track, a company is required to use more diligence and keep the tracks in a better condition than it would out in the country where no one ever passes over them."

7.

The court erred in giving that part of its charge to the jury in words as follows: "Contributed in any considerable degree to his injury."

8.

The court erred in giving that part of its charge to the jury in words as follows: "Now, if the plaintiff jumped on the engine at the time of the accident in the proper discharge of his duty, that is, if it was his duty to get on the front end of the engine while in motion, or if he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, and by reason of the fact that either the plate broke or gave way and he was injured, or even if he did not slip or it gave way, but that he slipped by reason of the fact that the weather was bad, and he fell and was injured, and the injury was caused by the fact that the track had not been filled up between the cross-ties, and you further find that under the evidence and the law as I

explained it to you, a failure on the part of the railroad company to fill it up was negligence, then he would be entitled to recover."

9.

The court erred in permitting the plaintiff to testify as follows:

"Q. Do you know anything about the condition of the step before this accident occurred? Immediately before this accident, when this accident occurred, can you say just what condition it was in at that time?

"Court: Do you know what condition it was in immediately afterwards?

"A. I couldn't say what condition it was in.

"Q. Do you know what condition it was in a short time afterward?

"A. A short time afterward it wasn't there.

"Q. Then you don't know the condition of the step at the time of the accident?

"A. I can't say what condition it was in.

"Mr. Blackwood: Did you see it early next morning?

"A. Early next morning I went down and looked at the engine and the piece had been removed."

10.

The court erred in permitting the plaintiff to answer the following questions:

"Q. Do you know what is the customary and safe way to fix yards?

"A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there

will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule."

11.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. You were on the stand awhile ago. I will ask you when you saw this step next before this accident occurred to Tom Tennessee?

"A. I seen it the last trip I was out with the engine and cautioned my brother not to try to catch on that pilot, that the foot plate was loose on it."

12.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Could the inspector have found out the condition of the step if he had inspected it?

"A. Yes, sir."

13.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Did you see it any more after you saw it the next morning after Tom was injured?

"A. I never seen it no more. The next morning I went down there through the yards and the piece had been removed.

"Q. Wasn't on there at all?

"A. No, sir."

14.

The court erred in permitting the witness Wesley Graves to testify as follows:

"Q. Were you in the habit of doing it?

"A. Yes, sir; I always do it. I do it up till this day."

15.

The court erred in refusing to permit the witness A. McAvoy to answer the following question:

"Q. Were those other yards used in the same condition as this yard was used in?"

16.

The court erred in permitting the plaintiff to testify as follows:

"Q. How were those yards fixed up before they were in general use?

"Court: A large yard such as this is and where the ground is such as it is here, are freight trains permitted to run into it before it is completed or not?

"A. No, sir; they were not allowed to go in.

"Court: The question is not what was done in any one yard, but do you know how yards of this kind are run and how they are managed?

"A. Yes, sir.

"Court: Can you state that freight trains are not permitted to go into yards until everything is completed?

"A. All that I ever seen. They would fill them in and not have them ready for use until the tracks were filled in with gravel or something.

"Court: State in what manner you helped. Did you superintend the building of them, laying them out and planning them?

"A. No, sir.

"Court: Just worked as a common laborer?

"A. I worked as a common laborer and helped lay steel and ties.

"Counsel for plaintiff: You say you have had experience in helping to build at least three yards?

"A. Yes, sir.

"Q. Were they larger or smaller than the yards over here?

"A. Two of them were larger and one of them was about the same size.

"Q. What was the difference in the ground, or soil, from which these yards were built and the soil here?

"A. There wasn't any. It was all graded down.

"Q. Was that a sandy soil, an alluvial soil, a soil like this, or was it a rocky foundation?

"A. No, sir; it was solid dirt.

"Q. Dirt something similar to this over here where this yard was built?

"A. Yes, sir; I suppose so.

"Q. Have you ever had any occasion, from your own experience in the railroad business, to notice the drainage or settlement of dirt around the ties, how it affects a road when it is newly built, how it should be built in order for it to drain successfully, and in order for it to settle quickly? Have you had observation; do you know anything about that?

"A. Yes, sir.

"Q. Now, then, what, in your opinion, would be the proper way to construct the yard so as to make the drainage successful and so as to get the yard in a good and proper condition as soon as practicable?

"A. I have worked several gangs on the tracks that way myself, and I always would fill in the track and fill it up with gravel.

"Court: The question is about a new yard.

"A. Fill it in with gravel where it is newly laid, then as it settles work this gravel in under it. It will make the track more substantial than it would by just leaving the ties lying on the ground and heaping a little dirt in the center to hold it. We have always filled up the ties and left the ends of the ties on a gradual slope, like that, so that when it rains the water can drain off the ends of the ties."

17.

The court erred in refusing to give defendant's instruction No. 1, in words as follows:

"The presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work, and, when this is overcome by positive proof that the appliances were defective, the plaintiff is met by the further presumption that the railroad company had no notice of the defect, and was not negligently ignorant of it. It is not sufficient to show that the plaintiff was injured and that the injury resulted from a defect in the step, but he must go further and establish the fact that the injury happened because the railroad company did not exercise proper care in the premises, in discovering and repairing said step."

18.

The court erred in refusing to give defendant's instruction No. 2, in words as follows:

"One of the contentions in this case is that there was no defect in the step which the plaintiff alleges caused the

injury. The contention of the defendant is that the step was in a sound condition and perfectly safe. The court instructs the jury that if they find from the evidence that the said step was not defective or unsafe and that plaintiff, Tennessee, in attempting to mount the same while the engine was moving toward him and by reason of his foot's slipping or by reason of having lost his balance or by reason of having missed the step altogether, and suffered the injury complained of, he cannot recover."

19.

The court erred in refusing to give defendant's instruction No. 3, in words as follows:

"You are also instructed that even if said step was defective and the plaintiff knew, or had reasonable opportunity to know, of the same, and still attempted to step thereon, and was injured, he cannot recover."

20.

The court erred in refusing to give defendant's instruction No. 4, in words as follows:

"The court instructs the jury that even though they believe from the evidence that the step to the pilot was defective and dangerous and the plaintiff was injured thereby as alleged, yet if the jury believes from the evidence that the plaintiff negligently or without ordinary care and caution got upon defendant's track, or on the side thereof, in front of the approaching engine and negligently or without ordinary care and caution, attempted to step upon the foot board in question, and in doing so slipped and was run over by the engine and injured, then the plaintiff cannot recover.

"And in determining what was ordinary care on the part of the plaintiff in this case, you will take into consideration all the surrounding circumstances, such as the size of the step, the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, the fact that the engine had an electric headlight that blinded plaintiff, the condition of the track, the fact that plaintiff had only two fingers on one hand and it would therefore be more difficult for him to catch himself in case of a misstep or fall, the fact that the night was cloudy and dark, and all other facts of a similar character disclosed by the evidence."

21.

The court erred in refusing to give defendant's instruction No. 5, in words as follows:

"The court instructs the jury that if the plaintiff knew of the condition of the footboard in question at the time of the injury complained of, and negligently went upon defendant's track in front of the approaching engine in order to step upon the said footboard, and his foot slipped and he became entangled in the ties and was unable to extricate himself therefrom before the occurrence of the injury, and he was thereby injured, then he was guilty of negligence and cannot recover."

22.

The court erred in refusing to give defendant's instruction No. 6, in words as follows:

"The court instructs the jury that under the evidence in this case the plaintiff assumed all the risks incident to the condition of the cross-ties on defendant's roadbed at the place of the injury, and if you find from the evidence that the

alleged condition of the cross-ties produced the injury, you will find for the defendant."

23.

The court erred in refusing to give defendant's instruction No. 7, in words as follows:

"The court instructs the jury that the plaintiff was bound to notice the defect in the track of which he complains if, in the discharge of his duty, he had an opportunity to notice the same, and if he did have such an opportunity the law presumes conclusively that he did have knowledge, and if after he observed or had opportunity to observe the defect he was injured at said point by reason of said defect, he cannot recover."

24.

The court erred in refusing to give defendant's instruction No. 8, in words as follows:

"The court instructs the jury that if the evidence in this case shows that plaintiff had, at or about the time he attempted to get on the step of the pilot, an opportunity to observe the condition of the ties between the rails where he attempted to get on, and that after having such knowledge, or the means of acquiring the same, and the danger of attempting to get on there being apparent, and he then attempted to get on said step, he assumed all risks of accident or danger incident to the condition of said ties, and he cannot recover by reason of the condition of the ties."

25.

The court erred in refusing to give defendant's instruction No. 9, in words as follows:

"The court instructs the jury that if they find from the evidence that it was dangerous or imprudent for plaintiff to get upon said step while the engine was moving toward him, and it was within the power of said plaintiff by proper signals to have said engine stop before attempting to mount the same, and the plaintiff failed to have said engine stop before attempting to mount, and slipped and fell in so attempting to mount, whether the said accident was due to any defect in the step or not, then the plaintiff was guilty of contributory negligence and cannot recover."

26.

The court erred in refusing to give defendant's instruction No. 10, in words as follows:

"The court instructs the jury that one of the alleged grounds upon which plaintiff is seeking to recover in this action is the fact that the cross-ties in defendant's switch yard had not been filled in and that they were standing some fifteen inches above ground. The court instructs the jury that if they find from the evidence that the defendant's switch yard at the point where plaintiff was injured was in the condition alleged by plaintiff and had been in the same condition at the same time of the injury and for several months prior thereto, and that plaintiff had been in defendant's employ for some time prior thereto, and had passed along and through said switch yard on defendant's tracks frequently, and had had an opportunity by the exercise of ordinary care to have known the condition of the said switch yard and the likelihood of danger at the said point, and continued in the employ of the defendant, you are instructed that said plaintiff thereby assumed all risks and hazards of accident resulting from the

alleged negligent condition of defendant's track, and he cannot recover and you will find for the defendant.

"And on this point, the court instructs the jury that the master may conduct his business in his own way, although such methods may be more than ordinarily hazardous, and the servant assumes the extra risks and perils by continuing in the employ of the master when he has knowledge of the master's methods, either actual or presumed. And the court instructs the jury that where the defect, or danger, is obvious, as in this case, knowledge is presumed on the part of the plaintiff of the dangers which it suggests and which are apparent."

27.

The court erred in refusing to give defendant's instruction No. 11, in words as follows:

"The court instructs the jury that even if you find from the evidence that it was necessary for the plaintiff to ride upon the step in question in the discharge of his duty, and it was in the power of the plaintiff to have said engine stop before mounting said step, and he undertook to mount while the engine was in motion, rather than signal it to stop, then he was guilty of contributory negligence and cannot recover."

28.

The court erred in refusing to give defendant's instruction No. 12, in words as follows:

"If the jury find from the evidence that the railroad company had established and promulgated a rule for the protection of brakemen, which warns and prohibits them from

getting or stepping on the front end of engines as they approach them, and that the plaintiff attempted to step on the front end of the engine in violation of said rule and regulation, then you are instructed that the plaintiff was guilty of negligence and you will find for the defendant."

29.

The court erred in refusing to give defendant's instruction No. 13, in words as follows:

"If the jury believe from the evidence that the plaintiff got upon defendant's track, or near thereto, to step upon the footboard in question as said engine approached him, and in attempting to step upon said footboard he slipped from said footboard on to the track and was run over by said engine, then he was guilty of negligence and cannot recover."

30.

The court erred in refusing to give defendant's instruction No. 14, in words as follows:

"You are further instructed that although you find and believe from the evidence that the step in question was defective and the plaintiff thereby received the injury complained of, still he is not entitled to recover in this action unless he has shown by a preponderance of the evidence (that is, a greater weight of the evidence) that the defendant, or its servants who were intrusted with the duty of inspection, had notice of the fact that said step was defective prior to the time of the injury, or that the step was defective a sufficient length of time before the injury, that its condition could have been discovered by the defendant, or its inspectors, by the exercise

of reasonable care, and could not have been discovered by plaintiff by the exercise of the same degree of care; and, unless the plaintiff has so shown, you will find for the defendant."

31.

The court erred in not instructing the jury to bring in a verdict for the defendant, for the reason that the record shows that the whole evidence was insufficient to support the allegations of the complaint.

The foregoing were the assignments of error filed in the circuit court (Tr., pp. 114, 122). In the Circuit Court of Appeals it was assigned as error that that court erred in not sustaining each of said assignments of error, and in addition:

The said Circuit Court of Appeals before which was heard the writ of error which brought up the record in this action from the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas to said Circuit Court of Appeals, erred in making its order affirming the judgment of said Circuit Court of the United States, and directing a mandate to issue to the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, directing the said Circuit Court of the United States to proceed in accordance with the decision and order of said Circuit Court of Appeals.

That the said Circuit Court of Appeals erred in not sustaining the writ of error then before it, and in not reversing the judgment entered in this action in said Circuit Court of the United States and in not directing a new trial of the issues raised by the pleadings in said action.

7594

BRIEF.

The defendant in error in this case bases his right to recover upon two distinct grounds of negligence: first, the alleged defective condition of the step attached to the pilot or cowcatcher of the engine, which he was seeking to mount at the time of his injury, and second, the alleged defective condition of the track in not having the spaces between the cross-ties filled in with dirt at the place where the injury occurred.

The mere fact that the step in question may have broken off (which is not admitted) when the plaintiff undertook to mount it, does not, in itself, constitute negligence. The step must have been in a defective condition by reason of the negligence of the railroad company in failing to exercise ordinary care to provide a safe step, or if it had provided a safe step to use ordinary care in discovering the fact that it had subsequently become loose and so defective as to render it dangerous to use. Even if these conditions had existed in this case, they did not furnish a sufficient ground for recovery, for the further reason that this act of negligence on the part of the railroad must have been the proximate cause of the injury. The plaintiff alleges in his complaint that, notwithstanding the step gave way and precipitated him to the ground, yet if the ties had been properly filled in when plaintiff fell he might have escaped uninjured, and that by reason of the negligent construction of said track plaintiff was caught in between the same and thereby suffered the loss of his leg. So that the right to recover in this case seems to be predicated almost entirely upon the condition of the track at the place of the

injury. The mere fact that the spaces between the ties were not filled in does not, of itself, necessarily make the railroad liable. It is not *per se* negligence to use a track in the condition in which this track is alleged to have been in, but conceding that the railroad company was negligent in both of these respects and that by reason thereof the plaintiff was injured, yet he cannot recover unless he was in the exercise of due care and caution himself and did not in any manner contribute to the injury, and was also ignorant of the dangerous conditions existing. We contend that the record in this case shows beyond any doubt that there was absolutely no negligence on the part of the defendant in either of the respects alleged, or in any other respect, but that the injury which plaintiff received was an assumed risk and was due solely to his own recklessness and carelessness, and we therefore now proceed to a discussion of the errors assigned, which will necessarily involve a thorough and complete review of the entire record of the case.

Notwithstanding the errors complained of in the charge of the court to the jury, we think that the charge in effect amounted to a peremptory instruction to the jury to return a verdict in favor of the defendant, and we can therefore properly consider the 1st, 2d, 3d, 4th, 22d, 29th, and 31st assignments of error together, and will embrace them in the argument which we now purpose to make upon the refusal of the court to instruct the jury to return a verdict for the defendant, which is the 4th assignment of error.

Alleged defective condition of step.

Turning to the transcript (p. 53) **THOMAS CUNEO**, engineer, testified as follows:

Q. When you started back — you were the engineer on that trip — where did you start from on your return trip?

A. From Hopefield, just across the river from Memphis.

Q. Did you inspect your engine before you left?

A. Yes, sir.

Q. Was that your business?

A. Yes, sir.

Q. Did you make a careful inspection?

A. Yes, sir.

Q. What was the condition of the step then?

A. It was all right.

Q. Did you inspect the step when you got in that night?

A. Yes, sir.

Q. After the accident?

A. Yes, sir.

Q. What was the condition of it then?

A. It was all right.

Q. After you had cut the engine off and looked at the step, it was all solid?

A. Yes, sir.

Q. Had Tennessee been on that step before on that day?

A. Yes, sir; he got on it at Forrest City going at about twelve miles an hour. A brakeman standing there hallooed at him and said: "What are you trying to do — get killed?" He rode about two or three car lengths at that time.

He also testified on cross-examination that it was his duty to inspect the engine at Hopefield (Tr., p. 57).

THOMAS TENNESSEE (Tr., p. 41) testified as follows:

Q. You said you were on that step two or three times that day?

A. I don't think I was on it more than once or twice.

Q. Did you notice anything wrong with the step then?

A. No, sir; I never had no idea of the step being loose and never paid any attention to it.

Q. If it had been loose, though, you would have detected it, wouldn't you?

A. Yes, sir; probably I might, but the engine was standing still one time when I got on it?

A. C. ROBKIN (Tr., p. 92), who was at that time master mechanic for the defendant railroad, stationed at Argenta, testified:

Q. Do you remember the time Tom Tennessee got his leg cut off?
A. Yes, sir.
Q. Where were you at that time?
A. I was at my office in Argenta.
Q. Is that at the roundhouse?
A. It is close to there.
Q. Were you there when the engine came in?
A. Yes, sir.
Q. Were you informed of this accident at that time?
A. I was informed of the accident when the engine rolled into the roundhouse.
Q. Were you informed how the accident occurred?
A. Yes, sir.
Q. What inspection did you make in view of the information you had received?
A. I looked over the pilot. The accident was from that part of the engine.
Q. Did you examine the step?
A. Yes, sir.
Q. What was the condition of the step?
A. The step was all right.
Q. Sound, was it?
A. Yes, sir.
Q. Are you in the employ of the company now?
A. No, sir.

MR. McKEISER (Tr., p. 83), machinist in the roundhouse at the time of the accident, testified that it was his duty to repair all engines that came in; that the next morning he repaired engine No. 5, on which Tennessee was injured, and that he worked on it for about six or seven hours; that he did not make any repairs on the step of the engine; that he had not made any repairs on the step any time within a few days before or within a few days after the accident; that he examined the step the next morning; that it was properly fastened

and in good condition, and as far as he could see it was perfect; that it was his exclusive business to do this work, and that there was no one else in the roundhouse at that time who could have done this work without his knowledge; that such work of this kind as was done on the engine was done by him.

HILLIARD GRAVES (Tr., p. 78) testified as follows:

Q. Were you on that step any time that day?
A. I remember getting on it once at Palestine.
Q. Is that east or west of Little Rock?
A. That's east of Little Rock.
Q. What occasion did you have for stepping on it?
A. We generally step on it to ride in. We were heading in.
Q. Did you get on there to make a coupling?
A. I got on there to ride in and make a coupling. We were heading in for the passenger train.
Q. What was the condition of the step at that time?
A. Well, it looked all right to me at that time.
Q. Did it feel all right?
A. I didn't pay much attention to it.
Q. Was that step in apparently sound condition?
A. Seemed to be to me; I didn't ride there far. I never made a practice of getting on the pilot.

JOE MEYERS (Tr., p. 69) testified that he was fireman on engine No. 5 at the time Tennessee was hurt; that next morning about 8 o'clock he stepped on the step and found that it was perfectly tight.

Turning again to the testimony of **THOMAS TENNESSEE** (Tr., p. 36), he testified as follows:

Q. When did you first find out that the step was defective?
A. I didn't ever know it was defective.
Q. Didn't you allege in your complaint that it was defective?
A. I said that in my judgment and knowledge it gave way with me. When a man is catching the pilot of an engine

he throws his foot up on the step and leans his whole weight on that foot until he gets hold of the top of the pilot. I got on it with my left foot and when I leaned over to get the top of the pilot it went right down with me.

Q. You don't know whether your foot slipped off or not?

A. I know that my foot went down. It didn't slip that way; it went straight down.

Q. You are just of the impression the step went off?

A. I don't know whether it went off or not; it gave way with me. At least, it went down.

Q. Did you see the step after that?

A. No, sir; I did not.

Q. You didn't examine it after that?

A. I couldn't examine it; I couldn't get around.

Q. Did you ever write Mr. Henry Wood, the vice president of the road, a letter about getting the injury?

A. Yes, sir.

Q. Did you make any complaint to him about any defect in the step?

A. No, sir.

Q. You merely told him in that letter that your foot slipped and you fell.

A. I told him that the step gave way and I slipped off it.

Q. What was it you said you wrote him?

A. I wrote him that I slipped off the step, but I didn't know how come me to slip off.

Q. You didn't tell him the step was defective, did you?

A. I don't just remember whether I told him the step was defective or not. I know I wrote him a letter concerning it, but I couldn't tell what's in the letter. It's been quite a long while.

Q. Is this the letter?

A. That's my handwriting.

(Defendant reads from said letter as follows:

"North Little Rock, Ark., July 30, 1900.

"*Mr. Wood, General Manager C., O. & G., and C. & M. R. R.*:

Dear Sir — On the 6th of February, 1900, I slipped off the front end of an engine, while heading in the yard on the north side, and lost my leg while performing my duty in the transportation department.")

Q. You say you never saw that step after that?
A. No, sir.
Q. When you got on that step, there was no handhold on that pilot?
A. No, sir.
Q. What did you grasp with your hands?
A. You can catch on the top of the pilot.

R. A. VAUGHAN (Tr., p. 48) testified: That at the time of the accident he was employed in the legal department of the Choctaw railroad; that he had a conversation with Tennessee at the hospital a short time after the accident; and that Tennessee told him that he slipped off the step; that Tennessee made a written statement at the time, which was as follows:

"My name is Tom Tennessee. I was brakeman on train No. 13, engine No. 5, west bound, on February 6, 1900. About 10 o'clock p. m., as we entered the yards at Argenta, I walked down and threw the first and second switches, and then in attempting to get on the pilot to ride down to throw the third switch the headlight blinded me. I jumped on the pilot as the train was running three or four miles an hour, and *my left foot slipped and fell between the pilot and the rail which threw me off of the pilot in front of the engine between the rails.* I rolled my body and right leg out of the track, but my left leg was caught and cut off just above the knee. I was not injured otherwise. The engine, after the first wheel hit my leg, made a good stop. I hallooed before that, but don't know whether he heard me. I don't think that he saw me or heard me either. At the time I was hurt it was raining and the pilot was slick. I have been braking fifteen or sixteen years, and have been hurt three other times in the service. I was on the engineer's side when I attempted to get on the pilot. Nobody saw the accident."

(Signed) THOMAS TENNESSEE.

HILLIARD GRAVES (Tr., p. 77), testified that he got to Tennessee about three minutes after he was hurt; Tennessee told him that he got on the footboard of the pilot and fell.

A. H. KILPATRICK (Tr., p. 91) testified that he had a talk with Tennessee about the accident after he got out of the hospital. That Tennessee told him that he went to get on the pilot and slipped.

JOE MEYERS says (Tr., p. 69) that Tennessee told him about ten minutes after the accident that he slipped off.

In his re-direct examination (Tr., p. 39), counsel for Tennessee tried to have Tennessee testify that at the time he wrote the letter to Mr. Wood he had not been able to make any investigation as to cause of his injury, but on re-cross examination (Tr., p. 40) he testified that he was just as fully advised at the time he wrote that letter as he was at the time of the trial.

It will thus be seen from the foregoing that there is absolutely not a particle of evidence to sustain any charge of negligence as to the step. On the contrary, the evidence establishes very clearly that the step was sound when the engine left Little Rock going to Hopefield, and that before the beginning of the return trip the engineer, whose duty it was to inspect this engine, inspected the step and found it in good condition. During the return trip Tennessee was on the step himself several times at different places, as was also the witness Hilliard Graves, and neither of them discovered anything wrong with the step. Immediately after the accident in the yards that night the engineer examined the step, found it in good condition; the master mechanic stated that he was waiting at the roundhouse for the engine to come in, and upon being informed of the accident, made an inspection of the step and found it in good condition, and

the roundhouse mechanic, whose business it was to make such repairs on engines, stated that he worked on this engine the next day for six or seven hours, during which time he examined the step and found it was in good condition. We contend that no reasonable mind can reach any other conclusion than that there was no defect in that step at all, and that Tennessee, in his written statement, made to Mr. Vaughan, and also in his statement to other witnesses at other times, that he attempted to get on this step and his foot slipped and he fell, told the absolute truth as to the occurrence. But, conceding that it could be in any way inferred from the evidence of Tennessee, that this step was defective, doesn't the evidence beyond any controversy show that the railroad company had used ordinary care in inspecting the engine, and that the step was in good condition? It was the engineer's duty at the Hopefield end of the line to inspect it before starting on his return trip, and he did so. Tennessee was on the step several times during the return trip, and if there was any defect in it, he had a better opportunity to find it out than anyone else. The only evidence introduced by Tennessee with reference to the step being loose, was the testimony of the witness, Wesley Graves. He testified (Tr., p. 24) that immediately before and immediately after the accident he could not say what condition it was in; that he saw the engine early next morning and the piece had been removed; that he saw this step the last trip he had made, which was several days before the accident, and that the footplate was loose (Tr., p. 41), and that he had cautioned his brother not to jump on that pilot. If it be

true that this step was loose several days before, it cannot be argued from that that it was loose on the occasion of the accident, because the evidence shows that the step was in good condition at that time, and further establishes the fact that the witness was either mistaken in his statement about this particular step, or that the step had been discovered in that condition and repaired.

The alleged negligence as to the condition of the track at the place of injury.

As we stated in the outset, it cannot be said, as a matter of law, that it is negligence to use a track before the spaces between the ties have been filled in. Upon this proposition there were but two witnesses introduced.

Tennessee (Tr., p. 30) testified as follows:

Q. Do you know what is the customary and safe way to fix yards?

A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or nothing for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

The railroad company, in order to disprove any charge of negligence on this point, introduced A. McAvoy, its road-master (Tr., pp. 60-63), who explained that it is usual for trains to be run over tracks in the condition in which these tracks were, as that is the only method they have of settling them, and this is usually done by new roads. He explained that when the tracks were first put in, it was necessary first, to do what is known as surfacing the track, that is, they haul dirt and throw it in the middle of the track so

that the dirt would slope back on either side from the center of the track out towards the rails, and this would not leave any dirt between the ties on either side of the track. That this process had to be gone through with in yards like this where it was necessary to get a foundation for the yards and establish a drainage before the tracks were filled in and ballasted. That after the yards were settled, they were then filled in and ballasted. That these yards were put in under his supervision, were built in the usual way and there had been no unnecessary delay in their construction or completion.

Wesley Graves (Tr., p. 43) testified as follows:

Q. Did you see the condition of those crossties at the time this accident occurred?

A. Yes, sir.

Q. What was the condition of them?

A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in; *none of the yard at all was filled in.*

This corroborates Mr. McAvoy as to the surfacing of the track.

To rebut the evidence of Mr. McAvoy, Tennessee took the stand (Tr., pp. 94-98), and undertook to give expert evidence as to how a yard should be constructed. His own evidence shows, however, that he was merely a day laborer; that he had never laid out and constructed yards himself, and that he had never commenced the construction of a yard and remained in charge and at work on them until they were completed. Furthermore there was nothing in his evidence to show that the same conditions in any respect existed as to the yards which he spoke of and the yards in controversy,

so that we say unquestionably that whatever experience he may have had elsewhere, or however competent he may have been to speak on the subject, could not be taken as any criterion as to whether the yards in question were properly constructed or not.

But, conceding, for the sake of argument, that the plaintiff established a clear case of negligence on the part of the railroad in the construction of this yard, it can avail the plaintiff nothing in this case for the following reasons:

1. The record shows conclusively that Tennessee knew the exact condition of the yard at that time.

2. That in attempting to get upon the step at this particular time, he was not in a place where his duties required him to be, and therefore the railroad company owed him no duty in respect to these yards at that particular time; and

3. That even if he had established actionable negligence with regard to the step and actionable negligence with regard to the condition of the yard, and that he was ignorant both of the condition of the step and of the condition of the yard, he was guilty of the grossest sort of contributory negligence in attempting to step upon the foot-plate attached to the pilot under the conditions at that time existing.

Tennessee's knowledge of the condition of the yard.

To begin with, we have it from the plaintiff himself that he was not a novice in the railroad business. He starts out by stating in the beginning of his examination that he had

been railroading for twelve or fifteen years in the capacity of brakeman and switchman, and that he had worked for seventeen or eighteen different roads during that time, but before he concludes his evidence in rebuttal of defendant's evidence, he finds it necessary to remember that he had had a much larger experience than this, and that he had also been employed in the construction of yards, and that he was well informed and competent to speak as to how yards should be laid out and constructed. He states that he commenced to work for the defendant about the 1st of December, continued to work until laid off in January, and did not go back to work any more until the 5th day of February. That he ran a part of the time from Brinkley to Memphis, and when they ran the first schedule in from Memphis, he came through on the first train about the 12th or 14th of December, and up until the time they commenced to use the new yards they came down the old main line, because the new yards had not then been fixed (Tr., p. 25). That the lead track to which the tracks in the new yard were connected, ran out from the main line in Argenta, and that there were seven or eight tracks in between the lead and the main track. That after he commenced to run into Little Rock, he made a trip pretty near every day until the time he laid off in January. That during that time he was running on a freight. That they generally got here about 9:30 or 10 o'clock in the morning, and sometimes got in on time at 6:10, which was daylight. That they generally got out about 6:40 the next morning, which was daylight (Tr., p. 25). That up until the time they commenced to

use the new yards, they made up their trains on the scale track, which is below the new yards, and that in going down to the old yards they had to pass below the new yards, and in coming back again they had to go along the old line out through the new yards. That the new yards are in sight from the main line track. That during that time he was head brakeman and that his position was on top of the train. That if he had looked from the top of the train he could have seen into the new yards (Tr., p. 32). During this time he lived at 410 Maple street in Argenta. That a short time before Christmas, he came down the old main line and the yardmaster told him to head into the new yards, that they were ready for use; so he backed down and headed down into the new yard. He then testified as follows:

Q. The first trip that you came back in the daytime, what track did you come in on?

A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use; so I backed out and headed down the new yard.

Q. Could you see, when you headed in on that track, that those ties were not filled in?

A. Yes, sir, I saw some of them were not filled in.

Q. Were any of the ties on that new track filled in?

A. Not as I know of.

Q. All that you know of were not filled in?

A. Yes, sir (Tr., p. 33).

He testified (Tr., p. 39):

Q. You stated that the first time you went into the new yards, you started down the old track and they told you to head into the new yard?

A. No, sir, not the first time. The first time I went into the new yards I went down the old main line.

Q. Who told you to go into the new yards the first time you went in there?

A. Mr. Wilson, the yardmaster.

Q. He told you this yard was ready for use?

A. Yes, sir.

Q. When was that?

A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

Q. You went in on the new track, what side track did you go in on?

A. I think it was No. 1 track.

Q. You made how many trips after that into the new yards before you were hurt?

A. About three.

Q. What tracks were you on before?

A. The first time we headed in on No. 2, and the next time all the tracks were filled up with cars and we went around on the lead.

Q. Where did that throw you?

A. That throwed us on the outside of the yard on the last track in the yard.

Q. What track were you hurt on?

A. No. 3.

Q. You never had been on that track before?

A. No, sir, I never had headed in on No. 3 track.

On transcript (p. 30) he testifies as follows:

Q. Did you know the condition of the ties, whether they were filled in or not at that time?

A. No, sir, I didn't ever pay any particular attention to them. I never had been in there more than once or twice and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two or three, and sometimes on the lead.

Q. You don't recollect ever having been on that track at all?

A. No, sir, not that I know of.

He testified as follows (Tr., p. 34):

Q. You say at the time of the accident you left the yards about 8 o'clock that morning?

A. Yes, sir, we left about 8 o'clock.

Q. You got back about 10 o'clock that night?

A. No, sir, the next night, Tuesday night.

Q. Did you have your lantern in your hand when you came down to throw those switches?

A. Yes, sir.

Q. How did you go along?

A. I walked on the outside of the track to the first switch.

Q. Why were you walking on the outside?

A. I was trying to find a clear track, I had to walk out there to see if the track was clear, so I could see around the curves.

Q. Did you look to see if these ties were filled in or not?

A. No, sir.

Q. You had your lantern?

A. Yes, sir.

Q. You could have seen?

A. Yes, sir, if I had taken time I suppose I could.

Q. What kind of a headlight did that engine have?

A. It had an electric headlight.

Q. Are not these electric headlights very brilliant?

A. Yes, sir, but you can't see around the curve.

Q. That wasn't on a curve, was it?

A. Yes, sir.

Q. Didn't that electric headlight light up the lead track down in front of you?

A. Yes, sir.

Q. The train was on the lead track, wasn't it?

A. Yes, sir.

Q. And you said you got injured on the lead track?

A. No, sir, I got hurt on No. 3.

Q. Do you mean to say that you had lined up No. 3 and the train was going in on No. 3?

A. Yes, sir.

Q. So you had already passed that track the train was going to head in on and had lined up the switch?

A. Had lined the switch up for that track.

Q. No. 3 leads out from the lead track, doesn't it?

A. Yes, sir.

Q. This headlight lit up everything in front of you?

A. Yes, sir.

Q. If you had looked you could have seen whether the crossties were filled in or not, couldn't you?

A. I suppose I could if I had stopped to look.

Q. I will ask you if this electric headlight doesn't light things up very brilliantly?

A. Yes, sir.

Q. You could see objects three or four hundred yards in front, couldn't you?

A. Yes, sir, about that far.

Q. It is so light?

A. It is very light.

Q. And if an engine with an electric headlight is moving down there and you are down there you can observe as well then the condition of the track as you can in the daytime, can't you?

A. A man's mind is not on the track.

Q. I am not asking you that?

A. Yes, sir, if he was to stop and look he could.

Q. You say you had thrown this third switch?

A. Yes, sir.

Q. When you gave the signal for the engineer to come ahead, what position did you take in order to step on this engine?

A. When I gave him the signal I stepped over into the track to catch the pilot.

Q. Into the middle of the track?

A. No, sir, not in the middle of the track, on the inside of the rails.

Q. You had your lantern?

A. Yes, sir.

Q. Did you observe whether the track was filled in or not?

A. I wasn't looking at the track, I was looking at the pilot of the engine.

Q. Did you look to see where you were stepping?

A. Yes, I had my light in my hand to look up at the pilot of the engine when it come to me.

Q. If you had looked down you could have seen that the ties were not filled in, couldn't you?

A. Yes, if I had looked down to my feet I could.

Q. You were standing there on the track with your lantern in your hand and the electric headlight shining?

A. Yes, sir, but I pulled my hat down over my eyes.

Q. What did you pull down your hat for?

A. So the headlight wouldn't blind me.

Q. You were standing there on one of the ties?

A. Yes, sir.

Q. And the electric headlight blinded you so you pulled your hat down over your eyes?

A. Yes, sir, to keep it from blinding me.

Q. You were standing looking down waiting for the engine to come up to you?

A. No, sir, I wasn't looking down. I had my eyes kinder slanting up.

Q. You pulled your hat down so it would be down just far enough to keep the light out of your eyes?

A. Yes, sir.

Q. That brought your line of vision somewhere near the top of the pilot?

A. Yes, sir.

Q. And you waited there?

A. Yes, sir (Tr., pp. 34, 35, 36).

Witness **WESLEY GRAVES** (Tr., p. 45) testified that these were new yards; that he was working for the road at the same time Tom Tennessee was; that he came in twice a week and had to go out twice a week; that Tennessee was performing a similar service on other trains; that Tennessee would be going out as he came in, and sometimes they would both go out on the same day; that he knew pretty well how these yards were constructed; that it was perfectly apparent that these ties were not filled in, and that he knew the condition of them; that the road was doing considerable work, putting in new yards, making an entire change, in fact, making almost a new line, enlarging their terminal facilities, making extensive repairs, working on many of their bridges, raising and widening the dumps. That they were working in almost every department of the road; that going around the lead track a pretty good view of the new yards could be had; that going out of the yards you can see the condition of them (Tr., pp. 45, 46).

THOMAS CUNEO testifies that the condition of these yards was perfectly patent and apparent to the eyes; that

anybody could see if he ran in there; that he made two trips with Tennessee into the new yards (Tr., p. 53).

JOE MEYERS testified (Tr., p. 71) that the condition of the track was apparent.

HILLIARD GRAVES testified (Tr., p. 77) that he was swing brakeman on that train at the time of the accident. That this was the second trip that Tennessee had made with him; that in December they came into the new yards; they were then putting in new tracks.

F. C. WEAVER (Tr., p. 86) testified, that in January or February he was running a freight train from Little Rock to Memphis; that Tennessee made one trip with him. They left from North Little Rock over the new yards. That when they came in they came into the new yards; that Tennessee was head brakeman; that he left at 6:55 a. m., and arrived back at 12:05 in the afternoon; that the condition of the tracks was apparent to anyone going in there on a train.

Tennessee testified on cross-examination (Tr., p. 97) that the information which he obtained with reference to the condition of the track at the place of injury was obtained the night that he was injured by the light of his lantern while he was sitting there waiting for them to come for him and take him to the hospital. That the electric headlight of the engine made a much more brilliant light than his lantern did. The blue print attached to the transcript shows the situation of the new yards with reference to the main track.

Was Tennessee in the proper place in the discharge of his duty at the time of the accident?

Tennessee testified, in his re-direct examination (Tr., p. 39) and that it was his duty to get on that step to make couplings, and also to get on there to ride into the switch yard; that it was the head brakeman's place to ride in front of the engine. He was then asked this question:

Q. *Had anybody ever told you to do that?*

A. *No, sir.*

He then said it was the custom on this and other roads and that in attempting to step on this step he was in the discharge of his duty. In this connection we desire to call the court's attention to the leading character of the questions and that it is his counsel testifying rather than himself.

In his cross-examination (Tr., p. 38) he says that if the track would have held his train in the clear, he would not have been on the front end.

In his cross-examination (Tr., p. 34) he states that he had gotten down and walked ahead of the engine to find a clear track on which to put the train. The record shows that this track has a capacity of forty-one cars, and that it was amply sufficient to hold Tennessee's train, and that the train was in fact left on that track that night.

Engineer Cuneo (Tr., p. 51) testifies that the only purpose for which that step is used is for the head brakeman to stand on while making what are known as pilot-bar couplings, that is, when the engine is to be coupled to a car to be pushed ahead of the engine, and that it was put there for no other purpose, and that Tennessee had no duty to

perform there at that time. As we have seen, Tennessee testifies that he found a clear track, and Cuneo also testifies that there were not any cars on that track at all. He testifies that after lining up the third switch Tennessee should have gotten on the step at the back of the tank, or on the ladder of the first box car, as that was his place; that as soon as the train is in the clear it is the head brakeman's duty to cut the engine off from the train and carry it into the roundhouse; that he was supposed to get on behind the engine. That there were ladders on the box cars, and on the back end of the tenders there is a big step, about eight inches wide and about eight feet long made of heavy board, which always have handholds.

WESLEY GRAVES testified (Tr., p. 42) as follows: That the proper position of head brakeman going in the yards at North Little Rock was to ride on the front end of the engine to line up the switches, to keep the engine from derailing by going out of an open switch and to see that the track is clear; that he is supposed to have a place to ride; that he was in the habit of doing it and did it till this day; that there had not been any objections to head brakemen riding on this particular place from the officers of the company, and that he did not know of any rule to prevent a man from riding there when they instructed him to ride there.

The cross-examination of Wesley Graves beginning on transcript, page 43, shows that witness was utterly at sea as to what he was talking about. He first professed to know the rules, and then he said he did not know them; he first said they were not working under the standard rules, and

then finally admitted that they were, and then when questioned as to what the rule was in respect to riding on the front end of engines, said he did not remember just exactly what the rule was. He was then handed a book of the rules and requested to read Rule No. 202, which he did as follows:

"Employees are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices."

JOE MEYERS (Tr., p. 70) testified that it was the duty of Tennessee to head the engine in and take the train into the clear; that his duty was to cut the engine off and take it to the roundhouse; that on this occasion he was just heading into the switch and had gone in about ten feet from the points and that it was his duty to catch the first car behind the engine or the rear of the engine, so as to cut the engine off; that if he had been in the proper discharge of his duty he would have taken his position at the back end of the engine; that they had something in the neighborhood of twenty cars that night; that there were no cars standing on the track they were heading in on, and that there was plenty of room for the train to clear; that the headlight shone down there, so that this fact was perfectly apparent; that this step is put there to couple and uncouple the engine; that it was not put there for any other purpose; that there was no rule of the railroad at that time which directed head brakemen to step up on this little step, but there was a rule which prohibited it.

R. W. HARRIS testified (Tr., p. 74) that after Tennessee had thrown that third switch that his duty was to be on top of the car where he could see the engineer, so that when they got the train in the clear, he could cut the engine off and take it to the roundhouse; that they left the train on that track; that there were no cars in front of them. That there is no rule of the company which requires a head brakeman to stand in front of an engine and attempt to step on that step as the engine approaches them; that in case of doubt, to take the safe side; that if the brakeman has any duties to perform on that step, he has a right under the rules of the company to stop the engine; that he knows of that being done on the road; that if there had been any other switch to throw he could have gotten on the gangway or could have stopped them and got on the front step; that it is not customary for head brakemen to ride in front to throw the switches before taking the engine into the yards; that he had a book of the rules of the company at that time; that he knew the custom of brakemen because he could see them; that he was studying then to be promoted to the position of brakeman, and he had to help switch and also inform himself as to the rules of the company.

HILLIARD GRAVES testified (Tr., p. 78) that he never made a practice of getting on the pilot; that it looks dangerous to him and he always avoids it; that it is not regarded as dangerous by all, and that it is a very customary thing for brakemen heading into the yards to jump on that pilot step and ride.

MR. S. H. BARNES, trainmaster, testified (Tr., p. 80) that ordinarily the duties of a head brakeman are to turn the switches leading into the yard, and find a clear track for his train. The track leading from the main track to the yards is called the lead track. In these yards there are various tracks where trains may enter and stand until they can be provided for. The head brakeman should open the main line switch and find a clear track leading from the lead and see that there is nothing in front of the train and direct the engineer to run in until all of his train is in; that in the performance of this duty it is not necessary at any time for the head brakeman to stand in the middle of the track and attempt to put his foot on the little step in front of the cowcatcher when the engine is moving towards him. If it is necessary for the head brakeman to couple to some cars, he should signal his engineer to come ahead until he gets near to the car he expects to couple to, stop him, and then get on the step and make the coupling. We instruct them not to get in front of the engine while it is moving; that when the train comes into the yards and the brakeman finds a clear track and lines up the switch so that the engineer can head in on the switch, he should get on top of some car near the head end of his train where he could see a signal from the rear of the train and transmit that signal to the engineer, so that the engineer may know when the train is in the clear; then he should stop when the train is in the clear and the head brakeman should cut the engine off and permit it to go to the roundhouse. Sometimes the head brakeman is required to take the engine to the roundhouse and sometimes the yard-

master; that there was a rule in force at the time of this accident which prohibited brakemen from standing in front of an engine and attempting to step up on the pilot as the engine was moving towards them; that it is considered a dangerous practice with a road engine for brakemen to stand in front of the engine and attempt to step on this step. By road engine, he said he meant a freight engine, an engine that has a pilot; a switch or yard engine has no pilot or cowcatcher, as it is sometimes termed, but has a step perhaps six inches above the rail fastened to the front end of the engine. This front step hangs from what is known as the pilot beam and above this pilot beam is a hand-hold, so that the switchman riding back and forth can stand on this step on each end of the engine holding on the hand rail, and while the railroad company does not permit them to get even on the yard engine while it is in motion, that is the rule, as a matter of fact the switchmen do it more than the road men with the road engines. The road engine has a pilot or cowcatcher and no hand-hold to catch hold on, and sometimes hasn't a step of any description. Ordinarily it has a small step on the bottom of the pilot three or four inches wide. It is there for use when it is necessary to make what is known as the pilot-bar coupling, and when the engine is supplied with an old-style pilot bar, the brakeman, if he does as he should, will stop his engine within two or three feet from the car, then step on the step, pick up the bar, hold it up, and when it enters the coupling of the car signal his engineer. That is what that step is for. That is the only use that the brakeman is expected to make

of that step. If he does not have to make a coupling he should get on the side of the engine. Steps are provided for that purpose on the side near the cab. After a man has thrown the last switch going into the yard, he has no duty to perform which requires him to get in front. If there is any car in front which it is necessary to make a coupling to, he should then only get on the front end of the pilot after he has made the stop close to the car in order to enable him to pick up the bar.

We invite the court's most careful attention to the evidence of Mr. Barnes, as it is the clearest explanation contained in the record of the duties of a head brakeman and the purpose for which this step is intended.

F. C. WEAVER testified (Tr., p. 86) that he had been a freight conductor on the Choctaw road, and that Tom Tennessee had made one trip with him as head brakeman. He stated that it was the head brakeman's duty to throw the switches in front of the engine and head into the yards. Next after that, he gets on top of the train, that is the proper position until the rear of the train has pulled into the yard.

I. M. WIGHTMAN, general yardmaster, testified (Tr., p. 88) that when the train was coming into the yards it was the duty of the head brakeman to turn the switches in front of the engine; that after he has turned the last switch and the train is headed in, he is supposed to get on top of the car behind the engine, where he can see from the rear end, so that he can signal the engineer when the train is in the clear. That if there is a pilot bar coupling to make, he should get on the step ten or fifteen feet from the car. That even if there had been

other switches to throw he shouldn't have got on to ride thirty-seven car lengths. That if he did not know whether his train would clear, he should wait until he got the proper signal from the rear.

Tennessee, in his evidence in rebuttal (Tr., p. 93), gives as his reason for getting on the step the following: "Why I did not know how long the track was, and didn't know whether it would hold the train or not. Didn't know the length of the track, and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches."

He admitted (Tr., p. 38) that he would have had no duty to perform in front of the engine except upon the contingency that the track was not long enough to hold the train; he also stated (Tr., p. 94) that an engine running at the rate of three or four miles an hour is not any more dangerous to get on the step of the pilot than it is to get on standing still. It is a customary thing with all brakemen to get on those steps running at that rate. It is not any more dangerous than to get on an engine standing still.

In this connection, we wish to call the court's attention to some confusion which has arisen in the testimony of Tennessee and Wesley Graves with reference to riding on that step and standing in front of an engine and getting on it when it is moving towards them. It is very much more dangerous to attempt to stand in front of a moving engine and mount the step than it is to ride on the step after one has obtained a foothold.

We think this evidence clearly establishes that Tennessee had no duty to perform on the step at the time of his injury. Simply because he said he did, does not make it so. It devolves upon him to establish that fact by giving some satisfactory and substantial reason why he should be there. He admits that he had gone ahead of the engine and found a clear track. Now, the only reason which he assigns for his presence there was that he did not know whether track No. 3 would hold his train, and admits that if he had known that it would, he would not have undertaken to have mounted this step. It turns out then that the very reason that he gave for his presence there is in this case no reason at all, for the uncontradicted evidence shows that there were only about twenty cars in his train and that the track had a capacity of forty-one cars. But, he says, that he did not know how many cars there were in his train and did not know the capacity of the track. Then, we ask, How was he to know whether he had any duty to perform upon that step? If he did not know positively that he did not have other duties to perform upon this step, then he should have informed himself or taken his position at some place where he could have been advised of that fact as the train was pulled into the switch. Now, if he had taken his position at the gangway of the engine, or on the top of the first box car in the rear of the engine, where he could have received signals from the rear, he could have then known at the proper time whether he had other duties to perform in the way of lining up switches ahead of the engine, but he took his position in front of the engine where he shut himself off from a signal either from the train crew or from

the engineer, and at a place where it would be impossible for him to tell whether there would be any other duties for him to perform.

Again, Mr. Wightman says that even if he had had other switches to throw at the lower end of that track, he should not have undertaken to ride on the engine that distance. Mr. Cuneo, Mr. Harris, Mr. Weaver, Mr. Barnes, and Mr. Wightman all state positively that it was his duty to get on the step on the side of the cab of the engine, or to get on the step in the rear of the engine, or to get on the box car just behind the engine where he might receive signals from the rear end of the train and transmit them to the engineer when the train was in the clear, and then after that was done to cut the engine off from the train so that it might be carried into the roundhouse.

Tennessee has not established any necessity for having attempted to mount that step on this occasion. The facts in this case do not bear him out in the reason that he gives for it, but on the other hand, show that it was entirely unnecessary and improper for him to take this position at this time. But let us, for the sake of argument, give Tennessee the benefit of the doubt, and admit that it was his business and duty to ride upon the front end of the engine on that occasion then certainly he would be required to perform that duty in a way not in violation of the rules of the company and to exercise ordinary care to protect himself. No one can deny that it is more or less dangerous to ride upon so small a step attached to the pilot of an engine. But this is not the question involved here. The question here is the question of

how to get upon that step. Now, it is in evidence that the railroad company had promulgated a rule prohibiting this very thing. Tennessee claims, however, that this rule had never been brought to his attention. It is shown by the evidence, however, that the railroad had in force at that time what are known as the standard rules, and he admits that he knew roads generally had rules, as he had worked for seventeen or eighteen different roads, and he certainly must have known what the standard rules were, and he certainly must have known that this road had some rules. A man with as much experience in the railroad business as he claims to have had must know that no railroad can operate without a system of rules.

WESLEY GRAVES (Tr., p. 44), who was an employee at the same time that Tennessee was, admits that they were working under the standard rules. Engineer Thomas Cuneo seems to have been familiar with the rules. Fireman Joe Meyers testified (Tr., p. 71) that in December or January, the master mechanic, Robkin, gave him a book of the rules, and R. W. Harris, flagman, testified that he had a book of the rules (Tr., p. 75). In fact, the rules seem to have been generally distributed and the employees were more or less familiar with them, and it is a curious thing that Tennessee should be the only one without the rules. But regardless of whether Tennessee had knowledge of any rule on this subject, let us examine the record for a moment, ascertain the circumstances under which Tennessee attempted to mount this step, and the opinions of the witnesses testifying as to whether this was a safe or prudent thing to do. The record shows that the step is

bolted onto the bottom of the pilot, sometimes called the cow-catcher, about six or eight inches from the point of the pilot; that it is wide enough for a man's foot to slip in, and there is a groove on the outside to keep a man's foot from slipping. It is bolted under the pilot. It is made of sheet iron (Tr., p. 24). Tennessee testifies that they arrived in the yards about 10 o'clock that night, and then proceeds to tell how the accident happened (Tr., p. 27). The record also shows that this step "sets angling with the pilot" (Tr., p. 38). The record also shows that it had been raining all that day (Tr., p. 36). That it was raining at the time of the accident, and that the pilot was slick (Tr., p. 50). Tennessee threw the switch, gave the engineer the signal to come ahead, stepped over into the track on the inside of the rails with his lantern in his hand, pulled his hat down over his eyes, so as to protect him from the electric headlight, and so that his line of vision was brought about to the top of the pilot of the engine (Tr., p. 35). There he stood so that he could not observe any part of the engine except the pilot, and when it came near enough he undertook to place his foot upon this small slanting step while the engine was approaching at the rate of about four miles an hour. His foot slipped and he fell, and the result was the loss of his leg (Tr., p. 35). He testified that in other yards where the ties were leveled, that he had slipped off lots of times and caught himself. In his cross-examination, he testified that he had slipped off wet days and dry days, and furthermore, that he had seen some of these steps break off (Tr., p. 31).

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THOMAS CUNEO (Tr., p. 54) testified that it was a dangerous thing to undertake to step on that little iron step when the train was in motion; that on that night it was very dangerous, as it was wet and slippery.

R. W. HARRIS (Tr., p. 74) testified that it was regarded as dangerous by railroad men for a man to attempt to step on one of these little steps when the train is in motion, and that if it is desired to get upon this step the signals ought to be used and the engine stopped; that it is dangerous at any time, but on account of the fact that it was slippery that night it would be more dangerous.

HILLIARD GRAVES testified (Tr., p. 78) on cross-examination, as follows:

"Q. Had you been warned by your brother (referring to witness Wesley Graves) not to get on that step?

A. Yes, sir; he told me about catching on the step in front of an engine that way.

Q. Did he tell you that the step was in a bad condition?

A. Why, he told me that none of those steps were safe to get on; No. 5 and other small engines.

Q. Did he caution you about that particular engine, No. 5?

A. That was the first day we came out on No. 5.

Q. Didn't he warn you not to step on No. 5?

A. I was warned to be cautious about getting on all of those pilots.

Q. Didn't you say awhile ago that you were warned especially about No. 5?

A. Yes, sir; he warned me about all of those small engines, and more particularly about these larger engines. That No. 5 was a new engine, that was the first time I ever seen that engine or handled it, to be on a train with it.

Q. You are an extraordinary careful brakeman?

A. Yes, sir; I am careful.

Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride, isn't it?

A. Yes, sir.

Q. If an engine was moving at a slow rate of speed, it is not very dangerous, is it?

A. No, sir.

Q. It is not dangerous?

A. No, sir; unless a person's scared of it; it's like playing with fire; it is liable to hurt you."

MR. BARNES testified that it was a dangerous thing to step on these road engines, and that a rule had been made prohibiting it.

THOMAS TENNESSEE, in his evidence in rebuttal on page 94 testified that it was not any more dangerous to get on the step of the pilot of an engine moving at a slow rate of speed like this one was than when the engine was standing still. This piece of evidence is characteristic of Tom's whole evidence, as it shows that his zeal in his behalf was leading him to make very extravagant and absurd statements. He did not stop to think what a ridiculous statement this was, because he must know that it is absolutely impossible for an engine standing still to run over a man and cut off his leg. Tom showed that he was quite handy as a witness on any question. If it was to his advantage not to know what the rules of the company were, he did not know them; if it was to his advantage to be able to testify as to how a yard was constructed, he was amply equal to the emergency. The record also shows (Tr., p. 38) that Tom practically had only one hand, and this was his left hand. On his right hand all of the fingers were off except the little finger and the one next to it. He also testified that there were no hand-holds on the engine and that when he placed his foot on this little step it was necessary for him to lean forward in order to put his hand on the top of the pilot to balance himself.

With all of these dangerous conditions existing it is inconceivable how anyone can reach the conclusion that it was anything else but a very dangerous act to attempt to mount this step under these conditions, and in addition to these facts, and from this standpoint, the contention that Tennessee makes that he did not know the condition of this yard is against him, and shows the utter recklessness that characterized his actions on this occasion. He testified that he had slipped off of steps like these both dry days and wet days; that he knew steps of this kind broke off sometimes. With this experience in the past, can it be said that he was using ordinary care to protect himself from harm without looking to see what his surroundings were, and ascertain if there were any impediments in the way of getting off the track in case he slipped or the step broke? If he did not, it only adds to his negligence, and renders it the more inexcusable that he should have attempted it on this occasion, when the hazards in other respects were largely increased. His action is rendered more inexcusable for the further reason that he was absolutely in command of the situation, and if he had an idea that he had other duties to perform in the yards ahead and conceived it to be his duty to ride upon the front end of this engine, upon this step, it was entirely within his power to have signaled the engineer to stop until he could safely take his position on this step before the engine proceeded. Engineer Cuneo testifies (Tr., p. 52) that if Tennessee had signaled him he would have stopped for him to get on.

In the face of this evidence, if any evidence is required upon such a patent proposition, it is conclusively shown that

this was a most dangerous thing for Tennessee to attempt, especially at this time. He undertakes in a measure to relieve himself of the charge of contributory negligence by undertaking to show that it was a general custom or practice of railroad employees to thus attempt to mount the engines and ride upon them going into the yards. In this he has signally failed. He testifies himself that nobody in authority connected with the road had ever told him to do it. Harris testifies that it was not the custom of the brakemen at that time to do it. He knew this because he was making a special study of the rules in force and the practices then prevailing among employees of the railroad company, expecting to be promoted to the position of brakeman, and was thus learning something of the duties that would devolve upon him in that position. Hilliard Graves testifies that he never made a practice of doing it, because it was dangerous. Conductor Weaver testifies that Tennessee had no business in making this attempt, and if he had any duties to perform in front of the engine, or thought he had any duties to perform there, he should have walked in front of the engine, and so does Yardmaster Wightman. Wightman was the yardmaster, and if any such practice had been prevailing in the yards it would have been an easy matter to have established the same by him. But the proof also shows that the defendant company had only been operating the road for about two months and it would have been impossible in that time for any practice to have sprung up in that respect that would have amounted to an abrogation of the rules prohibiting such practices. Furthermore, we do not understand that employees of a railroad

company can engage in a practice which is in itself dangerous, thereby abrogating a positive rule of the company on that subject, and then charge the company with negligence for a failure to enforce the rule, for they themselves would then be permitted to take advantage of their own wrong. If it could be said that this practice prevailed at this time, then Tennessee was as much responsible for it as anyone else, and if he had helped to establish the practice, then he must assume the risks of any dangerous custom or practice which he assists in establishing.

If it can be said that Tennessee had a duty to perform at this time, then he must give the railroad the benefit of the fact that it had also established an easy and a safe way for him to perform that duty. If it had been necessary for him to turn other switches at the lower end of the yard, the only difference that it could possibly have made to him if he had taken his position at a safe place on the engine, or on the first car behind the engine, would have been the physical exertion it would have cost him to walk the length of the engine.

We believe that this covers about what the record discloses in this case as to the facts, and we have attempted under each particular head to collate all of the evidence in tangible shape. Briefly summarizing then, our position from the evidence is this: first, the record does not show that there was any defect in the step which contributed to the injury; second, if it does show any defect which contributed to the injury, it does not show that the defect was caused by reason of the failure of the company to exercise ordinary care in reference thereto; third, if it does show a defect and that the railroad

company is chargeable with negligence in reference thereto, that it cannot be made the basis of a recovery in this action for the reason that it was not the proximate cause of the injury, for the plaintiff alleges in his complaint that if it had not been for the condition of the ties, he would have been able to extricate himself and prevented the injury, and testified positively to this fact in his evidence (Tr., p. 31), which evidence we believe we have not heretofore adverted to; fourth, the record does not show that the railroad company was in any manner negligent in the construction of its yards, which plaintiff alleges caused the injury; fifth, if it does show that the railroad company was negligent in the construction of the yards, the record also shows that the plaintiff was fully advised of and knew the condition of the yards prior thereto and at the time of the injury; sixth, that if the record does show that the railroad company was negligent in reference to the step, and was also negligent in reference to the construction of the yards, and that the plaintiff had no knowledge of the condition of the step or yards at the time of the injury, still he cannot recover for the reason that he was guilty of the grossest sort of contributory negligence in attempting to mount the step at the time of the injury, in plain violation of the positive rules of the company, and at a time when he had no duty to perform at that place.

It occurs to us that a mere rehearsal of the evidence is quite sufficient to show that the lower court undoubtedly erred in refusing to instruct the jury to return a verdict for the defendant, and also that the verdict of the jury was clearly contrary to the evidence and the instructions of the

court. In support of the positions here taken we beg leave to submit the following

AUTHORITIES.

Alleged negligence as to the condition of the step.

Tennessee had made the trip on this engine from Little Rock to Hopefield, opposite Memphis, without any accident so far as this step was concerned. Cuneo, the engineer, testified that it was his business to inspect the engine before the return trip was begun, and that he did make the inspection and found the step to be in good condition. The return trip was almost completed and the proof shows that the step had been used frequently on the return trip without any accident. As to these facts, there is no conflict in the testimony.

Now, the authority is clear that the fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish that the employer had been guilty of negligence.

> Texas and Pacific Railway Co. *v.* Barrett, 166 U. S., 617.
> Patton *v.* Texas and Pacific Railway Co., 21st Sup. Ct. Rep., 275.

In the case of the Texas and Pacific Railway Co. *v.* Patton, 61 Fed., 259, and also 95 Fed., 244, the syllabus reads:

"While a locomotive fireman was descending from a moving engine in a careful manner, the step turned, owing to its being loose, and he was thrown to the ground and injured. The locomotive had just come in from a run,

during which the step had been safely used several times. The roundhouse foreman at a certain point testified that he removed the step at that place, but he replaced it, or caused it to be replaced, properly, and that he was sure that the nut fastening the step was screwed up tight.

"*Held.* Insufficient to warrant a verdict against defendant railroad company for negligence."

Patton v. Texas and Pacific Railway Co., 21st Sup. Ct. Rep., 275.

In this particular case the failure of the railroad company to discharge the duty which it owed to the plaintiff with reference to the step cannot form the basis of a recovery, for the reason that it is shown that the only purpose for which the step was placed upon the pilot or cowcatcher of the engine was to enable brakemen to make what are known as pilot-bar couplings, and if a brakeman used the step for the purposes, and in the manner that it was intended that it should be used, it would be impossible for a defect in it to result in any serious injury to one of the railroad's employees. The only duty which the railroad company owed Tennessee with reference to this step was to see that it was safe for the purposes for which it was designed, and if in the use of the said step for the purpose for which it was designed it would have been impossible for the injuries to have occurred, the plaintiff cannot recover. Or, in other words, if the plaintiff was using said step for any other purpose than that for which it was designed, and was injured, he cannot recover, regardless of whether said step was safe or not, or whether the defendant knew or ought to have known of the defect or not.

Little Rock and Fort Smith Railroad Co. v. Townsend, Ad., 41 Ark., 382.

The alleged negligence in the construction of the yards.

On this proposition we wish to say that it seems very questionable as to whether this is a matter that can be left to the discretion of the jury. It is almost entirely a question of the most practical method of constructing this yard, and Mr. McAvoy, who had charge of the matter, stated that considering the physical conditions existing that this yard was properly constructed. We do not see how the evidence of Tennessee, who tried to contradict McAvoy upon this proposition, can really be considered as worth anything. In fact, the court practically told the jury to disregard the evidence of Tennessee upon this question. Mr. McAvoy explained that in a yard like this it had to be gone over for six or seven months, or probably a year, before it thoroughly settled; that unless this was done before it was finally filled in the track would go down in the mud. Now, it is unquestionably true that the railroad company cannot be held liable, both for filling in between the ties and for not filling in between the ties. Suppose that Mr. McAvoy had filled in between the ties when the yard was first built; according to his ideas, it would have been impossible in that way to have made a good foundation for the track to rest upon, because, he states, it would have gone down in the mud. We all know, as a matter of common observation, that all earth is not alike; we all know that it is more difficult to get a good foundation for a roadbed in some places than it is in others. McAvoy stated further that the only way that they could get the earth settled so as to make a proper

foundation was to use these tracks, and it was customary to use tracks in this condition on other roads. Now, then, let us suppose that Mr. McAvoy had filled in these yards and thereby rendered it impossible to make a proper foundation for this track No. 3, and in using it the ties had gone down in the mud and produced a low joint; and suppose that Tennessee had come into the yard riding on this step and the engine had struck this low joint and thrown him off in front of the engine and run over him, how would the case stand then? Why, unquestionably the railroad would have been liable, for the reason that, according to McAvoy's statements, the road would not in that case have been properly constructed. We say that this is a question of the most practical and safest way to construct this yard, which must be left to the discretion of the officials in charge of the railroad. We must remember that this was not an old yard getting out of repair by reason of long use, but that it was a new yard just under construction, and Tennessee knew that fact, because he had been running in and out of it, and this is one of the very conditions out of which the doctrine of assumed risks arises, and for injuries growing out of which the servant has no right of action against his master.

In the case of Tuttle *v.* Milwaukee Ry., 122 U. S., 194, the court say:

"We do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it shall be left to the varying and uncertain opinions of juries to determine such an engineering question.

(For analagous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see Richards *v.* Rough, 53 Mich., 212; Hayden *v.* Smithville Manufacturing Co., 29 Conn., 548, 558.) The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employees. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto; and if they decide to do so, they must be content to assume the risks. For the view of this court in a cognate matter see Randall *v.* Baltimore and Ohio R. R., 109 U. S., 478, 482, where it was said: 'A railroad yard where trains are made up, necessarily has a great number of tracks and switches close to one another, and anyone who enters the service of a railroad corporation connected with the moving of trains, assumes the risks of that condition of things.' It is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demand. The perils of the present case, arising from the sharpness of the curves, were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. *Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed.*" See also

Twitchell *v.* Grand Trunk Railway Co., 39 Fed., 419.

Logging Co. *v.* Schneider, 74 Fed., 195.

In the case of Southern Pacific Co. *v.* Seley, 152 U. S., 151, the defendant asked the court to charge the jury as follows:

"The jury are instructed that if they find from the evidence that the railroad companies used both the blocked

and unblocked frog, and that it is questionable which is the safest or more suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to impute the same as negligence to the defendant, and they should find for the defendant."

The court held that the instruction should have been given.

Now, we ask, how can that case be distinguished in principle from the case at bar? Mr. McAvoy is shown to have been in the service of this company and its predecessors on this same line for twenty-four years, and therefore it may be fairly presumed that he was competent to discharge the duties which devolved upon him, and that he was more thoroughly acquainted with the physical conditions existing in this case than the plaintiff. Now, if he testifies that this yard was constructed in the usual and proper manner, how can negligence be imputed to the railroad company because the yard was not constructed in accordance with the ideas of the plaintiff in this case?

In line with these facts was the case of Finell *v.* Delaware, Lackawanna and Western Railroad Co., 129 N. Y., 669, the syllabus of which is as follows:

"Railroad tracks are not ballasted for the purpose of making them safe for the employees of the company to walk thereon, but to make them firm and safe for the passage of trains; and the failure of the company to ballast a side track used for stowing cars and making up trains is not a breach of any duty to the employees."

In Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed., 747, this court said:

"Railway companies have the right to exercise reasonable judgment and discretion in the construction of their roadbeds and safety appliances."

In this connection it must also be remembered that Tennessee was not required to make up any trains (Tr., p. 33 and 87) in these yards. He was only required to leave his train on these tracks when he came in and only to get his train from these tracks when going out. Mr. Barnes testified (Tr., p. 80): "Off of this lead there are various tracks where trains may enter and stand until we can further provide for them."

Negligence cannot be imputed to the railroad on account of the construction of these yards, for the very obvious reason that it was a clear case of a risk which Tennessee assumed when he entered the employment of the company.

It must be borne in mind that this is not a case of an employee going into these yards for the first time without any previous knowledge as to the extent, character or condition of the same. The proof showed that these yards were under construction at the time Tennessee engaged his services to the railroad. He was running into the yards over the old track day after day while the yards were being constructed and in plain view of them. He lived in the same town all during that time and had been in these yards frequently before, going in and out. He had been on several of the other tracks at various times, and by his own testimony had been all the way around the lead track with which this track is connected, and it must also be borne in mind that this injury occurred just at the junction of the lead track with the third track as he testifies that he had thrown the third switch to line it up with the lead track, then took his position on the track just inside of the rails for the purpose of stepping upon this engine. He had by his own evidence

been all the way around this lead track before in the daytime and if he was then in front of his train, as he claims his duties required him to be, then he had had, in the discharge of his duty, an opportunity more than once before to observe this very spot. It could never have been obscured by cars standing on the track, as cars standing nearer than eight or ten feet to the switches will not clear. On this occasion, he testifies that he had his lantern in his hand; that the electric headlight was shining brilliantly and lighted up the whole yards in front of him for a distance of four or five hundred yards. The proof shows that he was injured on the third track not more than eight or ten feet from the place where the third track intersects the lead track, and after he had thrown the switch he got upon the track for the purpose of stepping up on the engine, so that if he had never been in these yards before and if he had never had any previous knowledge of the same, he had every facility afforded to him at that time to observe the exact condition of things just before the injury occurred. Indeed, he testifies that he was standing up on these very ties, and if he was he must have observed that the spaces were not filled in between them. That the light was amply sufficient to disclose to him the condition of things is quite evident from the fact that he testifies that he derived all of his information as to the condition of the ties after the injury from the light which his lantern afforded him. He furthermore testifies that all other parts of the yard that he knew of were not filled in, and that if he had taken the trouble to look down to his feet he could have seen that these ties were not filled in. We do not think that it is possible for Tennessee to

have stood just on the inside of the rails with his hat pulled down over his eyes so as to bring the line of his vision to about the top of the pilot without having necessarily observed the condition of the track where he was standing and between him and the engine as it approached.

In the case of L. R., M. R. & T. Ry. Co. *v.* Leverett, 48 Ark., 333, the supreme court say:

"While there was an implied contract between the appellant and the deceased that the former should furnish and provide for deceased a safe place and roadbed in and on which to perform the labors required of him, yet the failure in that regard furnishes no excuse for the conduct of the deceased, if he voluntarily and knowingly incurred the risks and dangers of performing the labors of his employment on the defective and dangerous roadbed. If he had, at and before he was injured, full knowledge of the dangerous character and defects of the roadbed, or place on and in which he was required to work, he had the right to decline to work, or require that the roadbed or place should first be made safe, but if he did not, and with this knowledge entered upon the work, he assumed the risk and should bear the consequences. L. R. & F. S. R. R. Co. *v.* Duffey, 35 Ark., 613; Fones *v.* Phillips, 39 Ark., 36; Gibson *v.* Erie Ry. Co., 63 N. Y., 452; Wood's Master and Servant, secs. 335, 372; Pierce on Railroads, p. 379. A servant is not required to inspect the appliances of the business in which he is employed, to see whether or not there are latent defects that render their use more than ordinarily hazardous, but is only *required to take notice of such defects or hazards as are obvious to the senses.*"

Further on in the opinion on page 348, the court says:

"There was no evidence, so far as we have discovered, to prove that the deceased, before he was hurt, knew or ought to have known of the condition of the track where he was fatally injured. There was evidence tending to prove that he was employed to work, and had been working, in a part of appellant's yard in Arkansas City, where the tracks and yard were in good condition. The first time we have any evidence of his working on the road where he was killed,

or his having been there, was the night and time he was killed. It was then dark, cloudy, and had been raining. He was called to fill the place of an absent employee, and while attempting to uncouple a car, at half past 4 o'clock in the morning, was run over by the cars and so injured that he died within two or three days thereafter. The evidence does not show that the defects which led to his injury were patent to ordinary observation, at the time and under the circumstances he was hurt, it being in the night and dark and cloudy, and we do not feel at liberty to indulge in the presumption that they were."

So that we say that the facts in that case were not at all analagous to the facts in the case at bar, and that the case of the defendant in error here falls clearly within the doctrine of assumed risks there laid down.

In the case of Railway Company *v.* Robbins, 57 Ark., 383, the court says:

"If the track had been in the same condition where the injury occurred as in other parts of the yard, we think that knowledge of it should be charged to the deceased; and if he were chargeable with such knowledge plaintiff could not recover, since deceased is held to have assumed the risks arising from a known dangerous condition that had continued from the time of his employment."

In the case at bar, Tennessee testified that all parts of the yard that he had noticed before this time were not filled in, and under the rule laid down in this case, even if Tennessee had had no knowledge of the condition of the yard at the place where he was injured, or means of obtaining knowledge, either previously or at the time of the injury, knowledge of the condition would have been imputed to him.

In Davis *v.* Ry., 53 Ark., 128, the court says:

"The question for the jury's consideration was not whether the railroad company was guilty of negligence in

failing to block the space between the main and guard rails; because, even if the failure to do that could, upon the evidence adduced, be found to constitute negligence, the proof shows that the deceased continued in the service after he knew, or what is the same thing *had full opportunity to know*, that the rails were unblocked."

Clark *v.* Missouri Pacific Railway Co., 48 Kan., 654, is strongly in point. The court held:

"Where the servant has equal knowledge with the master of the construction and condition of the roadbed of the railroad company, and knows all the dangers and hazards incident to his work thereon, such servant assumes all the risks and hazards of his employment."

In Atchison, Topeka & Santa Fe R. R. Co. *v.* John H. Alsdurf, Admr., 47 Ill. App., 200, the court held:

"In the absence of any agreement, a railroad company is not bound to furnish any better sidetracks than such as are in general use, and it is proper in personal injury cases where injuries are alleged to have occurred through defective side tracks, to admit evidence going to show that the tracks in question were constructed and kept in the usual and customary manner. Railroad brakemen must be held to understand the ordinary hazards attending their employment, and to voluntarily take upon themselves those hazards when they enter upon their duties. The law will imply in a given case, notice upon the part of a servant of those things which it *was his duty to observe and with which he had ample opportunity to become acquainted.*"

In Rogan *v.* Ry. Co., 97 Mich., 265, the court says:

"Obvious imperfections in methods of machinery *existing at the time of the employment* cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use imperfect methods and tools and to ask others to enter his employ to aid him in such use, and in so doing he does not undertake to insure the employee."

In Wabash Railroad Co. *v.* Ray, 152 Ind., 392, the court held:

"Where a danger or a hazard of a business is alike open to the observation of all, the master and the servant under such circumstances are on an equality, and the former is not liable to the latter for an injury resulting from such danger. An employee who has knowledge, or who, by the exercise of ordinary diligence or observation can learn of the imperfection of the machinery and appliances where he works, and the hazards of the premises where he performs the duties of his employment, and continues in the service without objection or promise of repairment, will be deemed to have assumed all the risks incident to such defects and hazards."

To the same effect see Swanson *v.* City of Lafayette, 134 Ind., 625; Big Creek Stone Co. *v.* Wolf, 138 Ind., 496; Pennsylvania Co. *v.* Ebaugh, 14 A. & E. R. R. Cas. (N. S.), 704.

The opinion in the case of Seldomridge *v.* Chesapeake & Ohio Ry. Co., 14 A. & E. R. R. Cas. (N. S.), 639, presents the reciprocal duties of master and servant in respect to patent defects and cites a number of cases in support of the principle announced, and the attention of the court is especially called to that case.

In the case of Baker *v.* Barber Asphalt Co., 92 Fed. Rep., 119, the court says:

"The very groundwork of the plaintiff's cause of action was the negligence of the defendant, as master, in failing to furnish the deceased a reasonably safe place in which to perform the work in which he was engaged. This obligation on part of the master is not, however, so absolute and unconditional that he is made responsible for any injury occasioned to an employee by imperfect construction or arrangement of the place in which the employee is assigned to work. As the master is ordinarily permitted to conduct his business in his own way and to apply such appliances

and structures as he may deem essential for his use, he is only liable to his servant for an injury when it results by reason of the neglect of the master to furnish the servant reasonably safe appliances with which to work and a reasonably safe place in which to perform it, where the servant himself is not aware at the time of the injury of the imperfection of the structure or the danger incident to the place. There is no rule of law better settled than that where the structure or place which caused the injury is perfectly obvious to the eye, and well known to the servant, both before and at the time of the accident, he himself assumes the risk of working under such conditions, and the master is excused from any liability therefor to the servant."

We think the facts in the above case are strongly analogous to the facts in the case at bar, and that it is conclusive as to this case.

In Kohn *v.* McNulta, 147 U. S., 238, the case was that of a brakeman who was injured while coupling cars. He alleged negligence in permitting cars of another road to be brought in on defendant's road, which cars had bumpers of unusual length. It was said by this court:

"It is not pretended that these cars were out of repair, or in a defective condition, but simply that they were constructed differently from the Wabash cars, in that they had double deadwoods or bumpers of unusual length to protect the draw bars. But all this was obvious to even a passing glance, and the risk which there was in coupling such cars was apparent. It required no special skill or knowledge to detect it. The intervenor was no boy, placed by the employer in a position of undisclosed danger, but a mature man, doing the ordinary work which he had engaged to do, and whose risks in this respect were obvious to anyone. Under those circumstances, he assumed the risk of such an accident as this, and no negligence can be imputed to the employer."

In French *et al v.* First Avenue Railway Co., 23 Pacific Rep., 1108, the syllabus reads:

"An experienced engineer, who had been employed in defendant's powerhouse for two days, ascended a platform between the winder wheels to oil the machinery, which work was a part of his duty, and while he was oiling he fell into the wheels and was killed. The platform on which he had to walk in order to reach the oil cups was in bad condition, and there was no guard rail to prevent him from falling if he lost his balance. The lights were also insufficient, and he took a candle with him to light him on his way. He knew the conditions and there was no danger which was not apparent to him.

"*Held.* That he assumed the risk, and the defendant's motion to take the case from the jury should have been granted."

The case of Detroit Crude Oil Co. *v.* Grable, 94 Fed. Rep., 73, 82, is a strong case on the doctrine of assumed risks as applied to this case.

This court in the case of Little Rock & Memphis Railroad Co. *v.* Moseley, 56 Fed. Rep., 1012, say:

"He (referring to the switchman) was simply bound to notice those obvious defects in the tracks, or in other appliances, which he had an opportunity to notice in the discharge of his duties as a switchman, and he is only affected with knowledge of such obvious defects as he is shown to have had an opportunity to notice before the injury complained of was sustained."

This declaration of law fits this case exactly. The opportunity to notice in the discharge of his duty was amply afforded to Tennessee. In addition to the opportunities which he had to observe this track on former occasions, at the particular time of the injury he had the fullest and most complete opportunity. He had his lantern in his hand; in adition thereto, the electric headlight lit up the whole yard, and he states himself that everything was as visible as if it had been in broad, open daylight. If it is possible to

conceive of a case where the duty devolved upon the servant to observe patent defects, if this may be called a defect, and if it is possible to conceive of a case where the servant had the opportunity to observe the condition of the roadbed, we certainly think that this is one of those cases. The plaintiff in this case did not have to make an inspection to ascertain the condition of these yards. He had been going in and going down by these yards all during the time of their construction; had passed around this lead track in the daytime in the discharge of his duty as head brakeman, and, on this occasion, it was so light that he could not but have observed the condition of the track, because it was patent and he had the fullest and completest opportunity to do so. In the Moseley case, we understand from the facts that the evidence did not show that the plaintiff had an opportunity to observe the defects, and in the Leverett case, *supra*, it was shown that this was the plaintiff's first trip in the yard, that it was nighttime and that he was performing the duty of an absent employee in uncoupling cars where it was necessarily dark. So, that we say if any case can be found where the declaration of law as to assumed risks as laid down in the Leverett case and the Moseley case can be applied, it certainly is in this case. We do not think that it is necessary to further multiply the authorities upon this proposition. As Mr. Bailey, in his work on the Master's Liability for Injuries to his Servants, p. 158, says:

"It is the duty of the servant, entering upon his service, to ascertain what he is expected to do, and the dangers directly connected therewith.

"As stated by a learned court: 'It is the duty of the servant to exercise care to avoid injuries to himself. He is

under as great obligation to provide for his own safety from such dangers as are known to him, or are discernible by ordinary care on his part, as the master is to provide for him. He must take ordinary care to learn the dangers which are likely to beset him in the service. He must not go blindly to his work where there is danger. He must inform himself. This is the law everywhere.'

"When he is a learner, and engages to work in a hazardous branch of the service, he must improve every opportunity furnished by the master to learn of his duties and their accompanying danger. If he fails, he is guilty of neglect. He must use reasonable care in examining his surroundings, to observe and take such knowledge of dangers as can be attained by observation. In performing the duties of his place he is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly. If he fails to do so the risk is his own. He is bound to use his eyes to see that which is open and apparent to any person using his eyes; and if the defect is obvious and suggestive of danger, knowledge on the part of the servant will be presumed, as well as when the dangers are the subject of common knowledge.

"The duty of the master, in such case, is not to see that the servant actually knows. He has a right to rest upon the probability that anyone would know what was generally to be seen by his own observation. So that in building his structures or conducting his business the master has the right to assume that the servant will exercise, in their use, ordinary care, and not unnecessarily expose himself to hazards not necessary or usual in his employment."

In Reed *v.* Stackmeyer, 74 F., 189, the court said:

"It is the duty of the servant to use ordinary care to ascertain the dangers attending the service in which he engages, and to protect himself against known dangers and such as can by ordinary care be ascertained. This duty is as imperative upon him as the duty laid upon the master. Wormell *v.* Railroad, 79 Me., 397; 10 Atl., 49."

How the plaintiff in this case could have brought himself any more squarely within the above doctrines we cannot understand. He states that in passing by these yards during their construction, he could have seen them if he had

looked. He knew the yards were under construction. It appears that all of the co-laborers of Tennessee who had been going in and out of these yards knew their condition perfectly, and Tennessee himself states that every part of the yard in which he had been was not filled in between the ties; that he was standing upon the very place where he was injured, and if he had only looked to his feet on this occasion he could have seen that the ties were not filled in.

But we do not have to rest our case here. If the evidence established conclusively that the railroad company had been guilty of actionable negligence in reference to the step and had been guilty of actionable negligence with reference to the construction of the yard, and that Tennessee had no knowledge of the condition of the step, and had no knowledge of the condition of the yards, and that he was at the time of the injury in his proper place, and in the proper discharge of his duty, yet notwithstanding all of that, the record in this case discloses that,

Tennessee was guilty of the grossest and most stupid contributory negligence.

In the case of Cunningham *v.* Chicago, M. & St. P. Railroad Co., 17 Fed. Rep., 882, the syllabus reads:

"A, in the employ of a railroad company as yardman, while engaged in his occupation as such, attempting to board the switch engine, with which he was working, by standing in the middle of the track and stepping on the rear footboard of said engine, which was approaching him, tender first, at a rate of from one to three miles an hour, but in the attempt, fell, was run over by the engine, and died from the effect of his injuries. The hand-rail on the rear end of the engine which was approaching the deceased, had been torn off the previous night and had not been replaced, and

the rear footboard of the engine in question was partly broken at one end. Suit was brought by the administratrix, the mother of the deceased, to recover the sum of five thousand dollars. The jury returned a verdict for one thousand dollars in favor of the plaintiff. Before the jury left the jury box a motion was made by the defendant to set aside the verdict.

"*Held.* That the act of so attempting to board the engine was clearly a case of gross contributory negligence on the part of the deceased, and the verdict should be set aside.

"When the jury brought in the verdict in this case, and before the jury was discharged, the defendant's counsel moved for a new trial on the ground that the verdict was contrary to the law and the evidence, and asked that the motion be then heard.

"The Court: I will hear the other side.

"Mr. Erwin: I would like to refer your honor to some authorities on the subject of contributory negligence.

"The Court: You may read them to the next judge who tries the case. I set this verdict aside. It was as clear a case of contributory negligence as has ever come under my observation, and it was with great reluctance that I refused to instruct the jury to find for the defendant. This is not only a case of clear negligence on the part of the deceased, but a case of stupid negligence on his part."

This case has been cited and approved by this court in Railway *v.* Davis, 53 Fed. Rep., 61. In delivering the opinion in that case Judge Sanborn said:

"The similarity of the negligent acts of the deceased in that case (referring to the Cunningham case) and in the case we are now considering, is striking, and the applicability of this rule of law to the facts of this case is obvious."

We think that the facts in the case at bar make a stronger case of contributory negligence than the Cunningham case. From the statement of that case, it appears that the plaintiff was attempting to step on the rear footboard of said engine. These footboards are provided so that switchmen may ride

thereon. The court will remember that Mr. Barnes explained very fully the difference in the equipment of yard engines which have a footboard in front of the engine for switchmen to ride on and road engines which have a footboard at the rear of the engine, and also this little step attached to the bottom of the cowcatcher so that brakemen might stand thereon and make what are known as pilot-bar couplings, and that these little steps were not intended to ride upon at all. Mr. Barnes testified that upon the Choctaw road the employees were prohibited from standing in front of a moving engine and attempting to get upon one of these footboards which are provided to ride on. So that we see that the facts in the case at bar make a grosser case of contributory negligence, because plaintiff was attempting to get upon this step which was not intended for brakemen to ride on, and at the time and under circumstances which made it considerably more dangerous than would have been under ordinary conditions. This case we think should be conclusive upon the question of the contributory negligence of the plaintiff in this case. The case of Kresanowski *v.* Railroad Co., 18 Fed., 229, so often cited by this court, is directly in point also.

Another case which we think is decisive of the question of contributory negligence in this case is Ry. Co. *v.* Jones, 95 U. S., 439.

The plaintiff in that case was one of a party of men employed in constructing and keeping in repair the roadway of the defendant. It was usual for the defendant to convey them to and from their place of work. Sometimes a car was used for this purpose; sometimes, only a locomotive

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and tender were provided. It was common, whether a car was provided or not, for some of the men to ride on the pilot or bumper in front of the locomotive. This was done with the approval of Van Ness, who was in charge of the laborers when at work, and was the conductor of the train which carried them both ways. When the party was about to leave one evening, the plaintiff was told by Van Ness to jump on anywhere; that they were behind time and must hurry. The plaintiff was riding on the pilot of the locomotive, and while there the train ran into certain cars belonging to the defendant and loaded with ties. It was held, for the purposes of that case, that the defendant was guilty of negligence in having or leaving the cars on the track with which the locomotive collided. The court held *that the fact that he was told to ride on the pilot of the engine was no justification for taking such a risk.* As well, they say, might he have obeyed a suggestion to ride on the cowcatcher or put himself on the track before the advancing wheels of the locomotive. The company, though, bound to a high degree of care, did not insure his safety. He was not an infant nor *non compos.* The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. They held that the court should have instructed a verdict for the defendant.

The reasoning and doctrine laid down by the court in the case of St. Louis and San Francisco Ry. Co. *v.* Schumacker, 152 U. S., 77, also makes a clear case of contributory negligence on the part of Tennessee. See also St. Louis and San Francisco Ry. Co. *v.* Marker, 41 Ark., 542.

In the case of Finell *v.* Delaware, Lakawanna and Western Railroad Company, 129 N. Y., 669, the facts are so similar to this case and the reasoning of the court is so strong and particularly applicable to the case at bar, that we have decided to set out the opinion in full, which is as follows:

"In September, 1888, the plaintiff was a brakeman in the service of the defendant, and while attempting to couple a car to the tender of an engine upon a branch track, one of his feet was caught between two ties, and he was run over and very badly injured; and this action was brought to recover his damages.

"While this case appeals very strongly to our sympathies, we are unable to uphold this recovery. The plaintiff was an experienced brakeman and was acquainted with the locality where the accident happened. The branch track was not constructed for the purpose of running trains of cars thereon, but for the purpose of storing cars and making up trains. It was not ballasted like the main track, and at the place of the accident there were some ties between which there was no ballasting whatever. The condition of the track, however, was perfectly visible, as it was broad daylight at the time of the accident. The plaintiff was upon the tender of the engine as it backed from the main track upon the branch. He had entire control of the movements of the engine, and could order it to be stopped at any time by a motion of his hand to the engineer, and thus it was backing upon the branch track under his direction. As it backed for several hundred feet the condition of the track was plainly visible to him, standing upon the brakebeam at the rear of the tender. It backed at the rate of about two miles an hour, or about half as fast as a man would ordinarily walk. It became necessary for the plaintiff to draw an iron bolt and take out the link which was in the drawhead of the tender, throw it over the hook which was in the drawhead of the car, and thereafter it was to be replaced in the drawhead of the tender and there fastened by the bolt. At a short distance from the car, while the tender was thus being backed, he jumped off the tender into the middle of the track, and attempted to remove the link from the drawhead while he was slowly walking back between the tender and the car, and as he was thus walking he claims that his foot was caught between two

ties, his toe partly under one and his heel against the other, and that it was thus fastened so that he could not withdraw it, and that the wheels of the tender passed over his legs. He claims that the defendant was negligent in not ballasting this branch of the track, so as to make it safe for him to walk thereon to discharge his duties as brakeman while standing thereon. *But we do not understand that the railroad tracks are ballasted for the purpose of making them safe for brakemen to walk upon but for the purpose of making them firm and safe for the passage of trains, and we do not think the defendant neglected any duty it owed to plaintiff in not ballasting the track at the place where the incident occurred.* It is not claimed that there was any trap in the track, or that the track was in any respect defective or dangerous, except in that it was not ballasted. A brakeman is engaged in a business attended by many risks, and it is difficult to see how this recovery can be upheld without casting all the risks of the employment upon the railroad company.

"But still further, the plaintiff was clearly guilty of contributory negligence. There was no rule of the company and no emergency that made it necessary for him to walk between the tender and the car while the engine was in motion, for the purpose of removing the link. The engine was under his control. He could have remained on the tender or on the side of the track until the car and tender were brought near together, and then he could have stopped the engine and drawn the link and made the coupling without danger. He knew the condition of the track, as it was before him perfectly visible, and he took the chances of walking upon the track while he was engaged in withdrawing the link, the engine being in motion, and thus he did an unnecessarily careless thing which contributed to this most unfortunate accident. This case is like that of the Pennsylvania Co. *v.* Hankey (93 Ill., 580), and that case is a very precise authority for the conclusion we have reached. This case is unlike that of Plank *v.* N. Y., C. & H. R. R. Co. (69 N. Y., 607). There, in the nighttime, the plaintiff's intestate was directed by the conductor of the train to couple some cars on the side track, and while engaged in so doing he stepped into a sluiceway or trench across the track, about two feet wide and deep, which was walled up with stone on each side. There was a trap left in the roadbed which rendered the track dangerous to any employee of the company who had occasion to be there in the nighttime, and there it was very properly

held that it was a question of fact for the jury to say whether the track was an ordinarily reasonable safe place for the performance of a brakeman's duties. This is more like the case of Appel *v.* B., N. Y. & C. R. Co. (111 N. Y., 550), where plaintiff's intestate, a switchman, employed in defendant's yard, in helping to make up and distribute trains, while engaged in his employment, caught his foot in a 'frog' which connected two converging tracks, and was used to effect the transfer of cars from one track to the other, but before he could release himself he was run over and killed. In an action to recover damages for his death, it was claimed that blocks of wood could be placed in the openings of frogs and thus prevent such accidents. It appeared that the intestate had been in the defendant's employ for some years, and for quite a length of time in and about the yard where the accident happened, and was acquainted with the frog and knew that it was not 'blocked,' and it was held that the intestate in accepting and continuing in the employment assumed the hazard of all known and obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog, or of the danger apprehended therefrom; and, therefore, that a cause of action was not made out and the refusal to nonsuit was error. Here, in this case, it cannot be said that the track was obviously dangerous to a prudent brakeman. The accident was a very unusual one, not likely to occur, and easily guarded against by any brakeman carefully discharging his duties. Knowing the condition of this track, he should not have walked upon it, except with the greatest circumspection. As the engine was entirely under his control, he could either have stopped it or had it move so slowly that no accident could come to him.

"We are, therefore, of opinion that the judgment should be reversed and a new trial ordered, costs to abide event."

Judgment reversed.

This case is in direct line with the decision of this court in Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed. Rep., 747.

The opinion in the case of Pennsylvania Company *v.* George Hankey, 93 Ill. Rep., 580, is strikingly similar to this case, and we also set out that opinion in full, which is as follows:

"This is an action brought by Hankey, appellee, against the Pennsylvania Company, appellant, to recover damages for an injury suffered by him, and alleged to have been caused by the negligence of the appellant. That corporation was operating the Pittsburg, Fort Wayne and Chicago Railroad.

"Appellee was in the service of appellant as a brakeman on freight trains. At the time of the disaster appellee, as such brakeman, was preparing to couple an engine and tender to a train of empty cars then standing on the side track at or near Englewood. This side track consisted of ties and rails laid upon a graded or level bed but without ballast,—the spaces between the ties not being filled with earth or gravel and being about six inches deep. The engine and tender were backing on this side track and plaintiff, while the same were in motion, tried to change the link at the rear of the tender. In making this attempt one of his feet was caught between one of the ties and the brakebeam at the rear of the tender, and he was thereby cast down in such position that the wheels of the tender passed over both his feet and so crushed them that it became necessary to amputate both his legs below the knees.

"A trial by jury was had, resulting in a verdict for the plaintiff and the assessment of his damages at the sum of $10,000. A motion for a new trial was refused and judgment rendered upon the verdict. This is an appeal from that judgment.

"Appellant insists that there is no evidence of wrong on the part of its management,—that plaintiff was guilty of negligence and that the injury was the result of his own folly.

"The only fault attributed to appellant consists in the failure to have this side track ballasted, and this upon the ground that (as it is insisted) ballasting was essential to the safety of its employees. It is urged that the spaces between the ties should be filled with earth so as to make a comparatively smooth track for them to walk upon in the discharge of their duties. This side track was built and used solely as a place for temporarily storing cars not in use. It was about two miles long and lay west of and but a short distance from the main tracks and nearly parallel to them, and was connected with the more westerly of these main tracks by a switch at the south end of the side track. The main tracks were well ballasted and smooth and so was that part of the south end of the side track which was at the switch and near to it; but north of that there was no ballasting and the spaces between the ties of the side track were wider apart than those

of the main tracks, being irregular and from two to three feet wide. This disaster occurred some fifty to eighty feet north of the switch — probably about seventy feet — and at that point the track was without ballast. At that time the engine and tender were backing northward slowly, moving not more than three miles an hour.

"The party of employees of whom Hankey was one, consisted of a conductor, engineman, fireman, and two brakemen. They came from Chicago for the purpose of taking a train of empty cars from this side track with an engine, tender and caboose,—the conductor and brakemen riding in the caboose. Traveling south on the more westerly of the main tracks they passed the train of empty cars on the side track, and on approaching the switch the caboose was cut off and left on the main track about one hundred feet north of this switch. The engineman, the fireman, and Woodworth (one of the brakemen) went on with the engine and tender, while the conductor and plaintiff got off the caboose and walked westward, the conductor to look after the numbers of the empty cars to be taken, and Hankey to put himself in readiness to couple the tender to the empty freight cars when the engine should be switched on to the side track and backed up to the south end of these empty cars.

"It was Hankey, the plaintiff, who cut off the caboose from the tender before it reached the switch going north and in so doing he took out the back pin, thus leaving the link attached to the tender. This link was a crooked or bent pin used in cases where the cars to be connected are not of the same height. It seems by the testimony of plaintiff that on leaving the caboose he went westward and was about to cross the side track at a point about forty feet north of the switch, when he was told by the conductor (who at that time had crossed the side track a little farther north) to change the link and that plaintiff at once returned to the caboose and there got a straight link and again went westward, crossing the side track before the engine at that point. As the tender was backing up he stepped into the track and attempted to walk back on the track while changing the links. He had made but three or four steps when his foot was caught, as stated above, and he was rendered a cripple for life.

"It is not shown affirmatively that common prudence demanded that a side track, used solely as a place for the temporary storing of cars should be ballasted. It is shown that such a track is 'not safe for brakemen to walk upon in coupling cars,' etc., but it nowhere appears that it was the

duty of brakemen to walk on the track while changing links or coupling cars on such a track.

"It is not shown, and no testimony contradicts this, that the engineman in switching and coupling is under the direction of the brakeman who has to do the coupling; that the brakeman in such case might halt the engine when, in his discretion, it ought to be halted, or may, by signals, cause it to move slower or faster as he thinks proper. The witnesses for plaintiff show plainly that a side track without ballast is unsafe for the brakeman to walk upon in changing links or coupling cars. No rule of the company is offered requiring brakemen to walk on such a track under such circumstances. It is not claimed that plaintiff was ordered by the conductor to do so. Plaintiff testifies that the conductor told him to 'change the links.' This in no sense can be held to mean that he should do so when the engine and tender were in motion. At that moment the engine and tender must have been south of the switch. If, as plaintiff's witnesses testified, this side track was in such condition that it was unsafe to change the links when the tender was in motion on that track, plainly it was the duty of plaintiff to have halted the engine before trying to change the link; or to have postponed the attempt to make the change until the tender reached the empty cars and had there become still.

"It is said, however, that plaintiff not being acquainted with this side track, had a right to assume that it was ballasted, and therefore might properly change the links as he did, the proof showing that it is not unusual to change the links when the cars are in motion.

"There are some difficulties in the way of adopting this position. This disaster occurred in broad daylight, and the plaintiff had walked to this track from the caboose, had seen the conductor cross it, and after going back to the caboose for the straight link, had returned and crossed it himself not more than twenty feet from the place of the accident, and hence the evidence does not tend to prove plaintiff in fact supposed that this track was not ballasted. He was himself a witness, and does not undertake to say that he did not observe that this track was without ballast. Again, we have often decided that travelers when about to cross or walk on a railroad track are required by common prudence to look and see whether any train is approaching. It would seem that a brakeman about to change links when the train is in motion must be required by common prudence to look, if he can, and

see what kind of a track he is about to pass over. Again, he had surely no reason to assume or suppose that this side track was ballasted, unless by the custom of railroad companies such tracks were very generally, if not universally, ballasted. In this case, defendant offered to prove that it was not unusual for railroad companies to have in use unballasted side tracks, but at the instance of plaintiff the court refused to allow the proof to be given. This evidence was surely competent on the question as to what vigilance was required in a brakeman under such circumstances. If it be true that an unballasted track is unsafe for a brakeman to walk on for the purpose of changing links where the cars are in motion and moving towards him, and if it also be true that unballasted side tracks are not unusual, it must follow that ordinary prudence requires a brakeman, before undertaking to do that dangerous thing, to ascertain, if practicable, whether the track in question is or is not ballasted, and if it be not ballasted, ordinary care plainly requires that before attempting to change the links he should cause the moving cars to halt, and wait until they are at rest, before venturing upon the undertaking.

"In view of the proof in this record, and the ruling of the court in refusing to permit the defendant to prove that it was not unusual for railroad companies to have in use side tracks without ballasting, we think the motion for a new trial ought to have been sustained, and for the error in refusing a new trial, the judgment in this case must be reversed and the cause remanded for a new trial."

Judgment reversed.

The case of Andrews *v.* Birmingham Mineral R. Co., 12 Southern, 432, is a case also directly in point, and we quote the opinion in that case in full, as follows:

"Appellant was a brakeman in the service of appellee. As the locomotive drawing one of appellee's trains approached a switch on the main line in the company's North Birmingham yard, he was standing on the foot braces on the pilot of the locomotive, which were twelve or fifteen inches long, and were intended for brakemen to stand on when switching. It was 10 o'clock at night. When about forty feet from the switch appellant says he saw it was thrown wrong for the train, and was ready to jump, when the engineer called out, 'Andrews, look out for that switch.' He then jumped on

the track in front of the engine and took three steps toward the switch when his leg went into a hole in the roadbed and he fell. The engine was moving at the rate of from three to five miles per hour and slowing up when he jumped off. By reason of the fall he was overtaken by the engine, run over, and injured. The hole into which he fell averaged at least three feet deep for the distance of eleven crossties, and looked appellant testified, like a trestle had been there. Appellant had never seen the hole before and did not know it was there until he fell into it. He examined it afterwards. The testimony also tended to show that 'where he jumped off, and thence in the direction of the switch, the track was on an embankment, which sloped off on the right side; that on the right there were two other tracks, about six feet apart, and the embankment on which was the main track, outside of rails of track, was covered with hunks of slag and cinder,' some of which weighed probably one hundred and fifty or two hundred pounds. On the left of the track it was narrow, being about two feet wide, and nearly perpendicular. Switch was on the left side. The roadbed between the rails where appellant undertook to go in advance of the engine was apparently level. There was no light there, except the headlight of the engine and the appellant's lamp, which he had with him. It was appellant's duty to attend to switches for that train on the occasion in question. There was other evidence tending to show negligence on the part of the defendant company in respect to the existence of the hole in the roadway.

"The cause of action relied on is the defective condition of the roadway, in that the hole in which appellant fell was negligently permitted to be and remain thereon. The defense relied on is contributory negligence. That defense was not specially pleaded, but the parties, without objection, actually tried the case upon that issue which brings it within the rule announced by this court in Farmer's case, 12 Southern Rep., 86 (at the present term). The filing of the special plea was thus waived by the appellant. The special act on the part of appellant insisted on by defendant as constituting contributory negligence was the act of jumping off on the track in front of the moving engine, and undertaking to go upon the track to the switch. As pertinent to the inquiry whether such conduct on his part was negligence or not, he offered to prove by his own testimony that it was the custom and practice on defendant's road, and on well regulated railroads, for brakemen when doing switch work in the

yard limits to stand and ride on the pilot of the engine, and to leave the pilot to do switching before the engine came to a full stop, and to show it was the custom and practice of engineers on defendant's railroad and well regulated railroads not to bring their engines to a full stop for brakemen to leave the pilot when doing switch work. The court sustained an objection to the introduction of this testimony, and appellant excepted. In Warden *v.* Railroad Co., 94 Ala., 277; 10 Southern Rep., 276, we use this language: 'The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence *per se* for persons to walk on the track of railroads. Doubtless, many persons are in the habit of using the track in this way. Yet, it has never been supposed, and it cannot be the law, that such custom would convert the track, which the law declares *per se* to be a dangerous place, into a safe place. * * * Custom and usage may be relied upon to excuse the violation of a rule when the act involved is not negligent itself, but only by relation to the rule violated; and so, when an act may be done in two or more ways, and resort to neither of which involves such obvious peril as raises the legal presumption or conclusion of negligence in the doing of it, yet custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which involves obvious peril, which is voluntarily and unnecessarily done, and which the law itself declares to be negligent.' A number of authorities are there cited in support of what was said. In Railroad Company *v.* Burton, 12 Southern Rep., 88 (at the present term), the law in reference to the admissibility of custom and usage of railroads as affecting the question of negligence, is also fully stated, to which we refer without quoting. Under the evidence in this cause, we are of the opinion that the plaintiff's conduct in attempting to go to the switch on the track in front of the moving engine, under the circumstances detailed by himself, involved obvious peril of his safety, and was *per se* negligence, which under the principle declared in Warden *v.* R. R. Co., and R. R. Co. *v.* Burton, *supra*, could not have been relieved by proof of the custom which he offered to introduce. It follows, conceding the existence of such a

custom, the defendant was entitled to the general affirmative charge which the court gave. The judgment of the city court is affirmed."

The plaintiff in the above case seemingly acted on the spur of the moment, without opportunity of mature consideration, but plaintiff in the case at bar, by his own testimony, had ample time to carefully consider his surroundings and the probable results of his contemplated action.

The following are interesting and strong cases on the question of contributory negligence as applied to the facts in this case:

Gleason *v.* Railroad, 73 Fed Rep., 647.
Kroy *v.* Railroad, 32 Iowa, 357.
Thompson *v.* Railroad, 153 Mass., 391.
Batterson *v.* Railroad, 53 Mich., 125.

We especially invite the court's attention to Rogan *v.* Railway Co., 97 Mich., 267, as it completely covers several phases of this case.

If we concede that Tennessee had any duty to perform at the time and place he was injured, there were two other ways in which he could have performed this duty with safety to himself and avoided taking any chances whatever. First, he could have signaled the engineer to stop until he had obtained a foothold upon the step, and second, he could have gotten on the steps leading to the cab of the engine, or he could have gotten upon the footboard in the rear of the engine, or he could have caught the first car behind the engine. In each and all of these places, steps and footboards were supplied upon which brakemen could ride with safety, and in taking either of these positions it would have been

unnecessary for him to have taken a position in front of a moving engine on the inside of the rails.

In the case of Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed. Rep., 747, this court said:

"When there is a comparatively safe and a more dangerous way, known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and thereby assumes the risk of the injury which its use entails."

In the case of Ry. *v.* Davis, 53 Fed. Rep., 63, this court said:

"If he voluntarily and unnecessarily places himself in a position that he knows is dangerous, or that an ordinarily prudent man in his position would know was dangerous, and is thereby injured, when there are other positions that he might have taken in the discharge of his duty that are safe, he cannot recover of the defendant, although the latter is in some degree negligent. He cannot recklessly and unnecessarily expose himself to a known danger, and then recover for an injury to which such exposure contributed."

This doctrine was reiterated and reinforced by many citations in the case of Union Pacific Railway Co. *v.* Jarvi, 53 Fed. Rep., 68.

In Lothrop *v.* Fitchburg Railroad, 150 Mass., 424, the court said:

"The general rule of law is, that when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master, or by anyone else, and when the servant has as good an opportunity as the master or anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of care."

In the case of Gowen *v.* Harley, 56 Fed. Rep., 983, this court said:

"Where there is a natural and safe method of performing his service, and the servant carelessly pursues a method that is obviously more dangerous, he is guilty of contributory *negligence, and cannot recover.* Russell *v.* Tillotson, 140 Mass., 201; 4 N. E. Rep., 201."

In Motey *v.* Pickle Marble and Granite Co., 74 Fed. Rep., 159, the court said:

"If the negligence of the servant was one of the proximate causes of his injury,— if his own negligence contributed to the unfortunate result,— he cannot recover of his master, even though the negligence of the master also contributed to it."

Many other authorities might be produced along the same lines of the foregoing, but we do not consider it worth while to worry or tax the patience of the court further along this line. As we remarked in the outset, we think that the charge of the court to the jury in effect amounted to a peremptory instruction, and that the verdict of the jury was contrary to the evidence. In this connection, we do not care to say anything further than to ask the court to read the charge of the court to the jury, found on pages 9 to 21, inclusive, and then apply it to the evidence as found in the record, and as we have undertaken to set it forth in this brief.

But beyond all this, the record shows plainly that neither the step nor the fact that the crossties had not been filled in, contributed in any way to plaintiff's injury. We get this from plaintiff himself. In the letter he wrote to Mr. Wood, he says: "I slipped off the front end of an engine," and in his written statement to Mr. Vaughan he says: "I jumped on the pilot as the train was running three or four miles an

hour, and my left foot slipped and fell *between the pilot and the rail.*" This is from the two written statements which Tennessee made regarding this accident soon thereafter, and are supported and substantiated by his verbal statements to the other witnesses who have testified. No mention was ever made or suggestion ever heard that the accident was in any way due to a defective step or to a defective condition of the track until the filing of this suit. It will be remembered that the step commences about six or eight inches from the point of the pilot and is about eighteen inches long. Tennessee says he stepped just inside of the rail to get on, and if he did he undertook to get on that end of the step next to the rail. This would throw the point of intersection of the pilot and the rail such a very short distance from the place where he slipped off, that the very second he fell he would necessarily be caught in this angle and it would simply be impossible for him to extricate his foot. The idea that he had time to make the effort to get out, which he says he did, and then deliberately give up and let go, as he expresses it, while an engine traveling at the rate of four miles an hour was going a distance of two or three feet is preposterous. An engine going four miles an hour travels about six feet in a second, and this would only give Tennessee one-half of a second to do all that he claims he did. He couldn't go through the mental process he describes in that time and the conclusion must be that he was caught between the bottom of the pilot and the rail almost the instant he fell, and this regardless of the condition of the ties.

For the foregoing reasons, we think that the 1st, 2d, 3d, 4th, 22d, 29th, and 31st assignments of error are well

founded, and that the case should be reversed and dismissed for want of evidence to support the verdict.

II.

The court clearly erred in that part of its instruction contained in the 5th assignment of error. The duty a master owes to its servants is not to furnish machinery in a reasonably safe condition, etc., but only to exercise ordinary care to furnish machinery, etc., in a reasonably safe condition. This is the law everywhere. This precise question was presented in the case of L. & N. R. R. Co. *v.* Johnson, 81 Fed. Rep., 679, and the case was reversed and remanded for a new trial for that error. The court there said:

"In respect to the duty of the railroad company the court erroneously instructed that the company 'undertook to furnish the plaintiff a reasonably safe place to work,' and to maintain the same. The instruction in full appears in the margin. The rule is well settled, and as early as 1894, in Railroad Co. *v.* Meyers, 24 U. S. App., 295; 11 C. C. A., 439, and 63 Fed. Rep., 793, had been declared by this court, that 'the master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servants with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair.' See, also, same case on second appeal, 46 U. S. App., 226; 22 C. C. A., 268, and 76 Fed. Rep., 443. In this case the question whether the railroad company was chargeable with negligence was, to say the least, close, depending upon the inquiry whether the space between the rail and board had become, or perhaps was by construction, of such necessary width as not to be reasonably safe, and whether the fact was so manifest and so long continued that in the exercise of due care the company ought to have discovered the defect in time to remove it. The error is emphasized by the terms in which the instruction concludes: 'If, while exercising reasonable care, his injury was brought about, the failure of the company to pro-

vide a reasonably safe place for him to do his work, the company is liable. That is the very crucial question for you to decide in this case.' It was, therefore, more important that an accurate definition and explanation of the company's duty should have been given to the jury. The error was not corrected by other portions of the charge, which, though implying the true rule, were not sufficient to prevent misunderstanding on the part of the jury. For instance, the jury were told that if they found that the defendant failed or neglected to keep its track at the place of the injury in a reasonably safe condition, and such condition was known to the defendant, or by the exercise of reasonable diligence could have been known to the defendant, etc., they should find the defendant guilty. In so far as this indicates that the defendant was bound only to ordinary diligence to discover defects caused by use it is perhaps sufficiently accurate; but the repeated and erroneous statement of the primary duty — to provide a safe working place — was left unmodified and unexplained. When it is proposed by a further instruction to correct an erroneous charge, the purpose should be stated, and the explanation made so clear as to leave no room for reasonable mistake."

This error was repeated several times by the court in the course of his charge. The error is corrected to some extent as to the step in the last paragraph on page 20 of the court's charge, but we do not think this is sufficient to correct so plain an error, as the whole charge was predicated upon that portion excepted to as being the measure of the master's duty to his servants. If this paragraph can be said to correct the error as to the defect in the step, it does not in any way correct the error so far as the condition of the yards is concerned, and if the case was to be submitted to the jury at all we think that it should have been submitted upon instructions in this respect which should have been absolutely without error or in any way misleading.

In the case of Railroad Co. *v.* Needham, 69 Fed Rep., 823, this court (quoting from syllabus) said:

"The extent of the duty of the master to servant in matter of place of service is to exercise ordinary care to furnish him a reasonably safe place and to use ordinary care and diligence to keep it in a reasonably safe condition, and it is error for a court to charge the jury that it is the master's duty to furnish the servant a reasonably safe place. This court has repeatedly so held."

III.

The court clearly erred in that part of his charge referred to in the 6th assignment of error (by some mistake there are two 7th assignments of error, but it is the first one we have reference to, Tr., p. 115) for the reasons, first, that it states a broad proposition which is not in all cases true. It may be that a railroad company in large railroad yards would be held to a greater degree of diligence with reference to some of its employees than it would to others, but we know of no rule of law which requires railroad companies to put their tracks in shape for any of its employees merely "to walk to and fro in crossing the track;" second, conceding that the court correctly stated the duty of the railroad company with reference to furnishing tracks for its employees "to walk to and fro in crossing the track" that is not by any means a measure of the duty of the plaintiff in this case to the defendant Tennessee; and, third, because there is nothing in this record which would make it obligatory upon the railroad company to furnish Tennessee safe yards in "walking to and fro in crossing the track;" fourth, because the instruction is abstract and there is nothing in the record upon which to base such an instruction. The proof shows that these yards are for the purpose of storing cars, and we do not know of any

authority anywhere which holds that a railroad must undertake to put its yards in a safe condition for its employees to walk to and fro in crossing the tracks. There was absolutely no proof in this case that any of the company's employees had any business in walking to and fro in crossing these tracks.

Finell *v.* D., L. & W. R. R. Co., 129 N. Y., 669.

IV.

The court erred in that part of its instruction contained in the 7th assignment of error which told the jury that if the plaintiff contributed in any "*considerable*" degree to his injury he could not recover. This is clearly the doctrine of comparative negligence which does not obtain in this jurisdiction. The court should have told the jury that if the plaintiff by his negligence contributed in *any* degree to his injury he could not recover.

In Railroad *v.* Marker, 41 Ark., the rule is correctly stated as follows:

"If the employee is guilty of *any* want of care, whereby he unnecessarily exposed himself to danger, and he is injured thereby, he cannot recover from the railway company."

The rule is thus tersely stated in Pennsylvania:

"That any degree of negligence on the part of the plaintiff contributing to the injury, destroys his right to recover. It is the kind of action, not the quantity, on the part of the plaintiff, which prevents the law from measuring between the plaintiff and defendant their respective degrees of negligence, when the former comes into a court of justice."

Oil City Fuel & S. Co. *v.* Boundy, 122 Pa. St., 449.

Bailey's Liability for Inj. to Ser., p. 413.

V.

The court clearly erred in that part of its instruction contained in the 8th assignment of error, for the following reasons:

1. There was no evidence to the effect that it was the duty of the plaintiff to get on the front of the engine while in motion. The only contention upon the part of the plaintiff on this proposition was that he was accustomed to ride on this plate sometimes in the performance of what he claimed was his duty, and that he and some other of the employees in performing that duty were in the habit of mounting the engine in the way that he attempted to get on it at the time that he was injured.

2. There was no evidence that he had been in the habit of being directed to do so by his superior officers whose command he was bound to obey, but on the contrary he stated that no one had ever told him to do that, and even if he had been commanded by some officer of the company in authority he would not have been justified in doing it if he could see it was dangerous and known to him to be dangerous.

Railway *v.* Jones, 95 U. S., 439.

Oil City Fuel Supply Co. *v.* Boundy, 122 Pa. St., 449.

This court, in the case of Railroad *v.* Reesman, 60 Fed Rep., 371, said (quoting from syllabus):

"The mere knowledge and assent of the conductor of a train to a violation by a brakeman on the train of a rule of the company requiring him to be on top of the car, in order to give signals to the engineer, does not exonerate the brakeman from the charge of contributory negligence for injuries received by him in consequence of his violation of such rule."

In the case of Thompson *v.* Railroad, 153 Mass., 394, the court said:

"But we understand that the offer (referring to a practice of brakemen jumping from a moving train) was to show that they did so without looking, or being able to look, to see where they would light, or what obstructions they would meet. If they thus acted, it would only certainly prove that they were habitually reckless and careless. They could not by such conduct make the railroad responsible for the injury occasioned them thereby, even if it met with the approval of the superintendent."

3. Because it eliminated from the consideration of the jury the question as to whether it was contributory negligence on the part of the plaintiff to attempt to mount the step when it was raining and the engine was slippery. One of our contentions is that if all the conditions which Tennessee claims had existed, and that if ordinarily he had been justifiable in mounting this step, yet on this occasion it had been raining all day and that the engine was slick, and for this reason alone (if there were no other reasons) it rendered it a dangerous and imprudent act for the plaintiff to undertake.

4. On the question of its being contributory negligence to mount the step on account of its being slippery, see the 20th assignment of error, in which the defendant asked the court to instruct the jury that they might take into consideration the fact that it had been raining all day and that such portions of the engine as were exposed were liable to be slick, etc.

5. And for the further reason that the charge instructed them that if he was injured by reason of the fact that either the step broke or gave way and he was injured, that the company would be liable, etc., without instructing

the jury also that so far as the plate was concerned the railroad company only owed the plaintiff the duty to use ordinary care to see that the plate was safe.

VI.

The court clearly erred in permitting the witness to testify as set out in the 9th, 11th and 13th specifications of error, for the reason that the condition of the step a short time before or a short time afterwards could not in any way tend to establish what the condition of the step was at the time of the accident.

R. R. Co. *v.* Hawthorne, 144 U. S., 202;
Shinners *v.* Proprietors of Locks and Canals, 154 Mass., 168;
Motey *v.* Pickle Marble and Granite Co., 74 Fed., 159, and cases cited.

VII.

The court erred in permitting the plaintiff to testify as set out in the 10th and 16th assignments of error, for the reason that there was no proper foundation laid for the testimony, as the evidence showed that the witness was a switchman and fireman, and did not show that he had any knowledge or experience as to how railroad yards should be constructed, and for the further reason that we think that the question of the construction of the yards under the proof in this case was purely a question of the most practicable way to build a railroad yard, and was not under the facts herein a matter that should be left to the discretion of the jury.

VIII.

The court erred in permitting the witness to testify as set out in the 12th specification of error for the reason

that the proof showed that before and immediately after the accident that the step was inspected and found in good condition, and there was no proof to show that the railroad company had not used ordinary care to furnish a safe step. No defect in the step at the time of the injury was shown.

IX.

The court erred in permitting the witness Wesley Graves to testify as set out in the 12th specification of error for the reason that the indulgence by witness in a dangerous practice would not justify the plaintiff in indulging in the same practice, and would not afford any criterion or measure of the liability of the railroad to plaintiff in this case.

Thompson *v.* Railroad, 153 Mass., 394.

X.

The court erred in refusing to allow the witness to answer the question asked him as set out in the 15th specification of error, for the reason that the proof shows that the road at this time was undergoing a state of reconstruction, and knowledge of the condition of yards at other places at that time would have imputed to plaintiff some knowledge, or, at least, put him on notice as to what the condition of this yard was.

XI.

The court erred in refusing to give the instruction set out in the 17th assignment of error, for the reason that it clearly sets forth the burden of proof which rests upon plaintiff in reference to establishing any negligence on the part of the railroad as to the condition of the step.

Ry. *v.* Baker, 67 Ark., 531.

XII.

The court erred in refusing to give the instruction set out in the 18th specification of error. We think the plaintiff was guilty of contributory negligence in attempting to mount said step, for the reasons already set forth.

XIII.

The court erred in refusing to give the instructions as set out in the 19th, 21st, 23rd, 24th, 26th, 29th and 30th specifications of error, for the reasons set out in the argument heretofore made upon the question of assumed risks and contributory negligence.

XIV.

The court erred in refusing to give the instruction set out in the 20th specification of error, for the reason that it directed the attention of the jury to certain circumstances which they should take into consideration in determining whether the plaintiff was guilty of any acts of contributory negligence, and the necessity for this instruction is further emphasized by the fact that the court's instruction as set out in the 8th assignment of error, eliminated from the consideration of the jury the question as to whether it was contributory negligence on the part of Tennessee to attempt to mount the step at a time when the step was wet and slippery. If this was not an act to take into consideration in determining whether plaintiff was guilty of contributory negligence, then it would be hard for a jury to know what acts they were to consider, and the court having eliminated the slick condition of the steps, it certainly must have left the jury somewhat confused to say the least of it.

XV.

The court erred in refusing to give each of the instructions set out in the 25th and 27th specifications of error, for the reasons set out in said instructions, and for the reasons given by this court in Gowen *v.* Harley, 56 Fed., 973.

XVI.

The court erred in refusing to give the instruction set out in the 28th assignment of error, for the reason that it is *per se* negligence for an employee of the company to violate one of its established rules with reference to negligent acts.

XVII.

The opinion of the Circuit Court of Appeals and the dissenting opinion of Judge Sanborn are found in the record at pages 127 to 134.

Only two witnesses appeared in behalf of the plaintiff —the plaintiff himself and Wesley Graves. The plaintiff entered the employ of the defendant in December, 1899 (R., p. 25), which must have been on or subsequent to December 10, as the defendant, Choctaw, Oklahoma and Gulf Railroad Company, did not own or operate the road prior to that date. Witness Thomas Cuneo testified as follows (R., p. 55):

"Q. When did the Choctaw Company take charge—the first of November, didn't they?

A. They took charge the 10th of December, and this was in February."

Prior to that time the road was owned and operated by the Little Rock and Memphis Railroad Company. Witness Wesley Graves entered the service of the old company in

1888 (R., p. 46) and continued in the service of the Choctaw Company after it acquired the property from the old company. It is important to remember these facts.

The court, in summing up the evidence introduced on behalf of plaintiff, says (R., p. 128):

"That he had never received instructions not to ride on the front end of an engine in the manner described, but, on the contrary, had often been commanded by conductors to so ride; that the only rule on the subject which had ever been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed."

There is no evidence whatever in the record that plaintiff had ever been commanded by a single conductor to ride on the front end of an engine, nor is there any evidence to support the statement "that the only rule on the subject which had been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed." The exact evidence touching these points is as follows:

WESLEY GRAVES, on direct examination (R., p. 43), testified:

"Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of?

A. No, sir.

Q. Do you know of any rules against it?

A. I don't know of any rule to prevent a man from riding on there when they instruct him *to ride* on there."

On cross examination he testified (R., pp. 43 and 44):

"Q. Do you profess to know what the rules of this company are?

A. The Choctaw?

Q. Yes, sir.

A. No, sir; I don't profess to know the Choctaw rules.

Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir; that's the instructions from the conductors.

Q. Did you ever see a book of rules?

A. Yes, sir; I have seen some books of rules.

Q. I wish you would point me out a rule that requires them to ride on the front end of an engine. Did you ever see a rule of that kind?

A. Yes, sir; I have seen that book of rules, but I never read them.

Q. Is it not a fact that there is a rule which prohibits employees from stepping up on the front end of an engine as it approaches them?

A. There is a rule which prohibits them from stepping up on the front end of an engine when it is going at a high rate of speed.

Q. Please read Rule 202 from the general rules and regulations of the operating department of the Choctaw, Oklahoma and Gulf Railroad, November 11, 1898.

A. We weren't using them.

Q. Don't you know that they were using these rules?

A. They weren't at that time.

Q. What rules were they using?

A. We were working under the standard rules.

Q. Are these the standard rules (referring to book of rules set out above)?

A. Yes, sir; those are the standard rules all right.

Q. If you were working under the standard rules and these are the standard rules, you were working under these rules, weren't you?

A. Well, what's that you want me to read?

Q. Read the rule.

Court: You were asked to state whether it was not against the rules of the Choctaw Company for any brakeman to ride on that step there when the engine is approaching, except when they are attaching the engine to cars, or coupling.

A. I am satisfied I never had any instructions not to ride on the front end of the engine coming in on a track. I always had instructions to ride there.

Court: How did you get that instruction?

A. I got it from the conductors.

Court: Not from the rule book?

A. I don't say I could find it in the rule book.

Court: Did you ever see it in the rule book? Did you ever see a rule book?

A. Yes, sir; I have seen rule books.

Court: Did you ever notice in there what the rule is?

A. Well, I don't remember just exactly what the rule is.

Mr. Peirce: Q. Read rule 202."

(Witness read rule as follows: "Employees are warned not to catch on to the front or rear end of the engine as it approaches them, to jump on or off trains or engines moving at a high rate of speed, to get between cars in motion to uncouple them, or to follow other dangerous practices.")

THOS. TENNESSEE testified (R., p. 47):

"Q. Did you ever have any of those printed rules, like that book?

A. No, sir; I never saw one until after I got hurt.

Q. You never got any printed rules of this company?

A. No, sir.

Q. What was the number of the engine you say you were on?

A. C., O. & G. engine No. 5.

Q. Do you know what make it was?

A. Rhode Island."

Cross-examination:

"Q. You know that all railroads generally have rules?

A. Yes, sir; all the railroads I ever worked for in my life furnished me with a copy of the rules before I went out.

Q. You know then as a general rule railroads have rules?

A. Yes, sir."

Redirect-examination:

"Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of the engine into a yard?

A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

Q. What do you mean by getting days?

A. They would pull me off from my work and lay me off ten or fifteen days.

Q. Trying to punish you for not riding on the front end?

A. Yes, sir."

It appears, then, that it was Wesley Graves who "had often been commanded by conductors to so ride," and it appears also that it was Wesley Graves who stated that "the only rule on the subject which had ever been prescribed by the defendant company that he ever saw was a rule warning its employees not to jump on or off an engine when it was running at a high rate of speed." Rule 202, above quoted, does prohibit employees from jumping on or off trains and engines moving at a high rate of speed, and in addition, also prohibits employees from catching on to the front or rear end of an engine as it approaches them. The plaintiff himself, so far as the evidence discloses, had never been instructed to ride on the front end of an engine, nor does it appear that he had ever actually seen Rule 202, or any other rule of the company relating to the subject. In addition to that, all of the evidence relates to *riding* on the front end, and even Wesley Graves does not say that he was ever told to stand in front of a moving engine and undertake to mount the step as it approached him, and it is very clear

that he himself had seen and read the very rule which prohibits it. The plaintiff testified that he knew that railroads usually had rules. The rule referred to by him of other roads prohibiting employees from attempting to get on an engine going at a high rate of speed is evidently the same rule that this company has. When he speaks of "getting days" for not riding on the front end, he does not refer to the defendant company but to other companies that he had worked for, because every day from the time he entered the employ of this company to the day of the injury is accounted for, and there is no suggestion that this company ever "gave him days" for not riding on the front end. In addition to all of this, there is a very great difference between riding on the front end and standing in the middle of a track in front of an approaching engine and attempting to mount this small step while the engine is in motion. If an employee should get a footing upon this step while the train was standing still, it might not be dangerous for him to stand there and ride while the engine was moving at a low rate of speed, but the proposition is very different when he undertakes to mount the step while the engine is in motion. The evidence of the plaintiff as to "getting days" on other roads was clearly incompetent and should have been objected to and excluded, but since it has crept into the record it should not, in any way, militate against the defendant in this case. Confusion has crept into this record still further from the fact that some practices and customs of the Little Rock and Memphis Railroad have also been testified to in this case in such a way as to really make it appear that this company were connected with the same.

We respectfully submit that the judgment in this case should be reversed and that the cause should be dismissed for want of evidence to support it.

EDWARD B. PEIRCE,

Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. ~~254~~ 67.**

THOMAS TENNESSEE.....*Defendant in Error.*

Brief for Defendant in Error.

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ARKANSAS DEMOCRAT CO., LITTLE ROCK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

CHOCTAW, OKLAHOMA AND GULF RAILROAD COMPANY.. .. ..*Plaintiff in Error.*

v. **No. 351**

THOMAS TENNESSEE.....*Defendant in Error.*

Brief for Defendant in Error.

STATEMENT OF CASE.

This case was originally instituted in the State court of Arkansas and removed to the United States court on account of the Federal character of the defendant.

A verdict was rendered for the plaintiff for $5,000 and the defendant took the case to the United States Circuit Court of Appeals, where the judgment of the lower court was affirmed. See 53 C. C. A., p. 497. That decision is now here for review.

The plaintiff relied upon two grounds of negligence: first, that the step on the front of the engine or cowcatcher, where the plaintiff, in the discharge of his duty, was accus-

tomed to stand, was in an unstable condition and not properly fastened; and secondly that defendant's company was operating its train over a yard in the city of Little Rock where the ties stood up some fifteen inches from the ground and thus made a mantrap into which plaintiff was thrown; that if said ties had been properly filled in where plaintiff fell, he would have escaped injury.

That plaintiff was just beginning to run into the new yard upon the new track and its dangerous condition was unknown to plaintiff. That plaintiff fell from this defective step and was caught in between these ties and run over by an engine to his damages in sum of $5,000.

Defendant denied the allegation of negligence and plead contributory negligence on part of the plaintiff.

The proof shows that the engine had been used on the west end of this road in the Oklahoma Territory for some time and was an old passenger engine patched up and repaired and put into commission as a freight engine. The evidence shows that the step had been out of fix some time previous to the accident. That the step was entirely removed from the engine between the time of the accident to Tennessee, some time in the night on the 6th of February, and 8 o'clock next morning. The testimony is silent as to who removed it or why it was removed. When Tennessee stepped on it that night it gave away. His leg was cut off and he was allowed to remain on the ground unattended for some hours. After the step passed by him he was unable to investigate as to its condition or why it gave way. The defendant's agents and servants did not seem to have accounted for the disappearance of the step.

The company operated on the old switch for some time until finally Tennessee was informed that the new yard was ready for service. He had only gone into this yard once or

twice before the accident. He has had very meager opportunities for observing its condition, usually coming in after night and going upon his train which was already made up early in the morning to assist in taking it out.

We do not think appellants have made an attempt to comply with the rules of this court in abstracting the testimony. It is true that they have quoted very liberally from the testimony in their brief, the portions of the testimony favorable to them. We therefore supplement the abstract by the following testimony, which we think will throw light upon the position contended for by the appellee.

PLAINTIFF'S TESTIMONY.

WESLEY GRAVES: I was one of the brakemen with defendant when he got hurt. I knew the engine that ran over him. It was a C., O. & G. engine No. 5. It came down from the west end, a little before Christmas. I made a trip with this engine four days before the accident (Tr., p. 23).

I know the step; it was bolted to wood. A short time after the accident the step was not there. Early next morning I went down and looked at the engine and the piece had been removed. I had seen it the last trip, about three days before the accident (Tr., p. 24).

Being recalled Wesley Graves testified:

I saw the step the last trip I went out with the engine and cautioned my brother not to try to catch on to the pilot, that the footplate was loose on it (Tr., p. 41).

The engine came down from the west; it was a Rhode Island make and was some five or six years old. I made a trip with this engine from Argenta to Memphis something

like three or four days before Tennessee was hurt. I inspected it. The inspector could have found out the condition of that step if he had inspected it; it was loose; you could see the condition of it.

By the court: "Was it so loose that by stepping on it you could tell it was loose?

"A. Yes, sir."

This was three or four days before the accident. Next morning after the accident I went down through the yards and the piece had been removed. Was not on there at all (Tr., p. 42).

I have been switching for this company since 1888 till March last. The proper position of the head brakeman is to ride in on the front end of the engine going into North Little Rock, to line up switches and to keep an engine from derailing by going out of an open switch, and to see that the track is clear (Tr., pp. 42, 43).

"Q. Where does he stand?

"A. He is supposed to have a place to ride.

"Q. Where is that?

"A. Have a footplate on the pilot.

"Q. Is that the customary place for the head brakeman to ride?

"A. Yes, sir; that 's the proper place.

"Q. Were you in the habit of doing it?

"A. Yes, sir; I always do it; I do it up till this day.

"Q. Were there any objections against the head brakeman riding on this particular place from the officers of the company, that you heard of?

"A. No, sir.

"Q. Do you know of any rules against it?

"A. I don't know of any rule to prevent a man from riding on there when they instruct him to ride on there.

"Q. Did you see the condition of those cross-ties at the time this accident occurred?

"A. Yes, sir.

"Q. What was the conditioin of them?

"A. It was a new yard and the ties had just been laid and the rails spiked down and the track just surfaced up, but the track wasn't filled in — none of the yard at all was filled in.

"Q. If it had been filled in between the cross-ties, how far would the pilot be from the surface of the ground?

"A. It would be something like three inches; three, or maybe four inches."

Cross-examination:

"Q. Do you profess to know what the rules of this company are?

"A. The Choctaw?

"Q. Yes, sir.

"A. No, sir; I don't profess to know the Choctaw rules.

"Q. Then what you said, you were just stating what the rules were on other roads?

"A. What I said was riding on the front end of an engine. That's Choctaw rules.

"Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

"A. Yes, sir; that's the instructions from the conductors."

If there were cars on the track you could not see the condition of track. You could only see it for a certain distance riding on the engine (Tr., p. 46).

"Q. Wasn't that new yard over there somewhat in a chaotic condition?

"A. Well, the tracks were all laid and in service.

"Q. They were all new weren't they?

"A. Yes, sir.

"Q. They were still working, weren't they?

"A. Yes, sir; they had quit work in the yards, and had the track laid, but not filled in.

"Q. If you go along the lead track you can see all the new yard can't you?

"A. Yes, sir.

"Q. When you go around that lead track you can get a pretty good view of the yards?

"A. Well, if there are cars standing on the track you can't see down the track.

"Q. After you get down in the lead track you can see the condition?

"A. Yes, sir.

"Q. If you are sitting up on the front end of the engine, you can see the condition of the lead track, can't you?

"A. Only for a certain distance.

"Q. As you go out you can see the condition of it?

"A. Yes, sir."

Redirect Examination:

"Q. You say you had been working for this company how long?

"A. Ever since the 23d day of December, 1888.

"Q. You worked for this company right along since that time?

"Yes, sir.

"Q. Up to what time?

"A. Up to the 18th of March, I believe.

"Q. You know what the custom was about these brakemen riding into yards?

"A. Yes, sir.

"Q. What was that custom?

"A. It's the custom to ride on the front end of the engine and line up the switches.

"Q. Was that the custom after the Choctaw & Memphis was bought by the Choctaw, Oklahoma & Gulf Railroad?

"A. Yes, sir.

"Q. Do you know whether these rules, these printed rules, were generally distributed to brakemen or not?

"A. In February or March when these rules were sent down they only got a small supply and they were only issued to the conductors and engineers and the brakemen didn't have any of them in their possession.

"Q. Did you ever have one of these books?

"A. No, sir.

"Q. Did you ever own one?

"A. No, sir.

"Q. Where did you see them?

"A. I seen them with the conductors; I only saw two or three of them. I never did see a brakeman with one.

"Q. What would be a safe condition for a track in a yard?

"A. Well, a safe condition for a track in a yard is for the track in the center to be filled, and on the outside of the ties and in between the rails, and blocks of timber in between the frogs.

"Q. You mean these spaces in between the ties are filled?

"A. In the yard they are supposed to be filled up level with the top.

"Q. Do you know when they first began to use these new yards?

"A. Well, no, sir; not exactly; I think it was before Christmas, a little before Christmas."

TOM TENNESSEE: I am 33; have been a brakeman and switchman for twelve or fifteen years; went to work for the Choctaw in December; then got my foot hurt and laid off in January, and did not go back any more until February 5. I ran from Brinkley to Memphis, then came in from Memphis on first schedule train.

"Q. When was that?

"A. In December, the 13th or 14th of December.

"Q. Where did you run from then on to the first of January or February?

"A. We run from here to Memphis and back.

"Q. What track did you run in on?

"A. We always generally come down the old main line. They didn't have the new yards fixed then. Later on I headed into the new yards about once before I laid off.

"Q. This jury probably do not know where the old main line was. Where did it go, down into Argenta?

"A. Yes, sir; it come right straight down into Argenta.

"Q. Where did the main line afterwards run?

"A. The main line still run down that way but they put in a lead, and there are seven or eight tracks between the lead and the main track. When the new depot was finished, the main afterwards turned and went across the bridge, and this lead line was the old main line.

"Q. You commenced, you say, about the middle of December to come into Little Rock. How many trips did you make before you laid off?

"A. I made one pretty near every day up until the time I laid off.

"Q. What were you running on?

"A. I was running on a freight.

"Q. What time did it get in here?

"A. Well, we generally got here about 9:30 or 10 o'clock. Sometimes in the morning we got in on time, at 6:10 (Rec., p. 25).

"Q. Was that before day?

"A. It was about daylight.

"Q. When did you generally get out?

"A. Generally about 6:40 the next morning.

"Q. Was that daylight?

"A. Yes, sir; just about daylight, but we had to use lanterns.

"Q. And you continued to run on that line until when?

"A. Well, we run in on the old main line until about Christmas. I went out Christmas eve morning and went to Memphis and didn't get out of Memphis no more until about the 27th. When we come back from Memphis we come into

the new yards. I come down the main line and the yard-master told me to back up head into the new yards, and I headed into the new yards."

Mr. Peirce:

"Q. That was when you were going to Memphis?

"A. No, sir; coming this way.

"Q. Did you make any more trips?

"A. No, sir; I laid off.

"Q. Did you lay off during January?

"A. Yes, sir; didn't work at all.

"Q. And you laid off; were you discharged?

"A. No, sir; I laid off myself; I got my toe cut and laid off."

Mr. Blackwood:

"Q. When did you return to your job again?

"A. I returned to work on the 4th or 5th, I think it was the 5th of February.

"Q. Where did you go when you came back to work?

"A. We went over to Memphis.

"Q. When did you get back?

"A. We left here Monday morning and started back Tuesday morning and got here about 10 o'clock that night.

"Q. Where did you start from on that trip?

"A. We started from Hopefield when we started back this way.

"Q. Where did you start from going to Memphis?

"A. We left from the new yard; we picked up our train around on the lead, I think it was track No. 8.

"Q. What time did you leave?

"A. We left here that morning about 7 o'clock; it may be a little after, about 7:40; we had to back over to the depot over the bridge before leaving."

* * * * * * * * *

"Q. You got back here about what time?

"A. About 10 o'clock at night.

"Q. That was the 6th of February last year?

"A. Yes, sir.

"Q. Just tell the jury what happened when you got to the yards?

"A. Coming in, I rid out from Carlisle — from Lonoke — I rid out from Lonoke, and I picked up a fellow and he rode with me into the yards here. I was sitting on the side of the train talking to him, and when we come into the yards I goes down to the engine. I jumps on the tank of the engine and goes on down into the engine. I gets down and throws the main line switch, and my lamp went out. I came back to the train and lit it, and goes on down and throws another switch and then walks on about sixty feet further and throws another switch. After that I undertook to get on the engine, at least, I did get on the engine, on the pilot, to ride on down to the lower end of the yards to see if the switches were all lined up. When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go.

"Q. How was your foot caught?

"A. My foot got hung between the ties, between the bottom of the ties, and held it fast. When my foot went down I couldn't get it out.

"Q. Then the condition of the ties is what made the accident possible?

"A. I couldn't get my foot out.

"Q. Explain to the jury how those ties are fixed.

"A. The ties were laid up on top of the ground and I suppose it was about eight or ten inches, probably more than that, from the top of the ties to the ground. When my foot went down I pulled my leg with all my might and couldn't get out. I pulled all the toe of my shoe off and bent the instep of my shoe back. I pulled with all my might, but I seen that I couldn't get it out and just give up and let it go.

"Q. What was the result?

"A. Well, the engine run over me when I fell, run over my leg. I hallooed as loud as I could to make the engineer hear me, but he didn't see me. But he must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could.

"Q. How fast were they running?

"A. They were running about four miles an hour.

"Q. Is that slow or fast?

"A. That's very slow.

"Q. When you got your foot caught under there the train ran over you and mashed your leg?

"A. Yes, sir; mashed it all to pieces.

"Q. Broke the bone?

"A. Yes, sir; broke the bone; mashed my knee cap all to pieces.

"Q. Try as you might you could not get out?

"A. No, sir.

"Q. Just tell the jury whether you suffered any or not?

"A. Why, I suffered just as near death as any man could suffer death and not die. It wouldn't have been as hard to die.

"Q. Did you lose consciousness?

"A. No, sir; I was perfectly conscious all the time.

"Q. How long were you left there on the ground?

"A. I lay there about an hour, I reckon. I lay there and begged them to send for a doctor. I told them to send for some doctor and let him put morphine or chloroform or something on my leg.

"Q. What was done with you?

"A. After I lay there about an hour, or longer I suppose, an engine from the west then pulled down into the yards and they took the engine off the other train and picked up our caboose and pulled down to where I was laying on the ground. Then they stopped awhile and said they didn't know how they would get me into the caboose. I told them if they would get close to me and help me I woud pull up into there. Then a man got on each side of me and I put my arms around them and raised myself up into the caboose; I put my hand on the step of the caboose and eased myself back and laid down" (Rec., pp. 28, 29).

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"Q. Did you know that there was anything the matter with the step when you got on it?

"A. No, sir.

"Q. Did you know the condition of the ties, whether they were filled in or not at that time?

"A. No, sir; I didn't ever pay any particular attention to them. I never had been in there more than once or twice, and I don't think I had ever picked up a train off of that track. Generally our train would be on one, two, or three, and sometimes on the lead.

"Q. You don't recollect ever having been on that track at all?

"A. No, sir; not that I know of.

"Q. What kind of a night was that?

"A. Well, it was raining, it was dark, it had been raining all day.

"Q. After you were hurt and were lying there on the ground, how far from the track were you?

"A. About a foot and a half from the track.

"Q. Did you notice the condition of the track?

"A. The ties were not filled in. I asked for my lantern and had it lit. I set it on the side of the track so if any engine came into the yards, they wouldn't run over me. I raised up and looked around at the ties and there wasn't any dirt between them.

"Q. Was there anything there between the ties?

"A. No, sir; just laying up on the ground.

"Q. Do you know what is the customary and safe way to fix yards?

"A. The general rule with all railroads is that they fill their tracks up level with the top of the ties so that there will not be any holes or anything for a man's foot to get caught in while coupling or uncoupling cars. All the yards are filled in perfectly level as a rule.

"Q. If it had been filled in level with the top of the ties, could you have got your foot caught in there?

"A. No, sir.

"Q. If it had been filled up level with the top of the ties, could you not have got your foot caught?

"A. No, sir.

"Q. If you had just slipped off, as they claim, and the ties had been filled in level, could you have got your foot out of the way of the engine?

"A. If the track had been filled level and I had slipped off I could catch myself. If they had been filled in level there would not have been any hole to get your foot caught in. I have been on engines before and my foot has slipped off and hit the ground and I could hold by my hands and raise up. In other yards where the ties were level I have slipped off lots of times and caught myself. There is no chance to get your foot caught in there. If you slip off you can raise your foot right up again" (Rec., pp. 30, 31).

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"A. We headed down the old main track until near about Christmas. About a day or two before Christmas, I came down the old main line and the yardmaster told me to head into the new yards, that they were ready for use. So I backed out and headed down the new yard" (Rec., p. 33).

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"Q. Didn't the company have a rule against brakemen stepping on this step?

"A. I never had any instructions to that effect.

"Q. Did you ever have a book of rules of the company?

"A. No, sir.

"Q. How many roads did you say you had worked for?

"A. About seventeen or eighteen different roads.

"Q. Did those other roads have any rules?

"A. Yes, sir.

"Q. Didn't you get any when you came to this road?

"A. No, sir; I didn't get any.

"Q. When did you first find out that the step was defective?

"A. I didn't ever know it was defective" (Rec., p. 36).

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"Q. You say there was another switch in ahead of you?

"A. No, sir.

"Q. At the time you got hurt?

"A. Yes, sir; there was some more switches.

"Q. When are you supposed to leave your engine and be done with your work?

"A. Not until we cut it off and carried it to the roundhouse and put it on the proper track.

"Q. And it is your business to stand on the front until the train is through?

"A. Yes, sir.

"Q. It was your duty to get on that step to make couplings and also to get on there and ride into the switch yard?

"A. Yes, sir; it is the head brakeman's place to ride in front of the engine.

"Q. Had anybody ever told you not to do that?

"A. No, sir.

"Q. And that was not only the custom of that road but of other roads?

"A. Yes, sir.

"Q. At the time you got hurt, when you tried to step on that step, state whether or not that was required of you by your duty?

"A. Yes, sir; I was at my duty.

"Q. Then you were in the discharge of your duty at that time?

"A. Yes, sir.

"Q. Now, why did you write to Mr. Wood? Did anybody ask you to put in a written application?

"A. No, sir; I was in a suffering condition and needed some money and was down sick and had nothing and wrote him simply for a compromise.

"Q. You didn't say anything about the step at all?

"A. No, sir.

"Q. And at that time had you been able to make any investigation as to the cause of your injury?

"A. No, sir; I never made any investigation" (Rec., pp. 38, 39).

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"Q. Who told you to go into the new yards the first time you went in there?

"A. Mr. Wilson, the yardmaster.

"Q. He told you this yard was ready for use?

"A. Yes, sir.

"Q. When was that?

"A. That was about the 18th or 19th of December, or about the 20th or 21st, only a few days to Christmas.

"Q. You went in on the new track, what side track did you go in on?

"A. I think it was No. 1 track.

"Q. You made how many trips after that into the new yards before you were hurt?

"A. About three.

"Q. What tracks were you on before?

"A. The first time we headed in on No. 2 and the next time all the tracks were filled up with cars and we went around on the lead.

"Q. Where did that throw you?

"A. That throwed us on the outside of the yard on the last track in the yard.

"Q. What track were you hurt on?

"A. No. 3.

"Q. You never had been on that track before?

"A. No, sir; I never had headed in on No. 3 track" (Rec., p. 40).

THOMAS TENNESSEE was recalled and testified as follows:

"Q. Did you ever have any of those printed rules like that book?

"A. No, sir; I never saw one until after I got hurt.

"Q. You never got any printed rules of this company?

"A. No, sir.

"Q. What was the number of the engine you say you were on?

"A. C., O. & G. engine No. 5.

"Q. Do you know what make it was?

"A. Rhode Island."

Cross-examination:

"Q. You know that all railroads generally have rules?

"A. Yes, sir; all the railroads I have ever worked for in my life furnished me with a copy of the rules before I went out.

"Q. You know then as a general rule railroads have rules?

"A. Yes, sir."

Redirect Examination:

"Q. Did you ever hear of any rule that prevented the head brakeman from riding on the front end of an engine into a yard?

"A. Never did in my life, any further than what is said in all general rules about an engine going at a high rate of speed. I have got days for not being on the front end of the engine coming into a yard.

"Q. What do you mean by getting days?

"A. They would pull me off from my work and lay me off ten or fifteen days.

"Q. Trying to punish you for not riding on the front end?

"A. Yes, sir" (Rec., pp. 47, 48).

THOMAS TENNESSEE testified in rebuttal as follows:

"Q. It has been stated here that after you threw the switch for No. 3 you had no further business on the end of the pilot. Just state to the jury what, if any, business you had after you threw the switch and started to go on?

"A. Why, I didn't know how long the track was and didn't know whether it would hold the train or not. Didn't know the length of the track and didn't know the capacity of it at all, and there was a cut-off switch at this end of the yard that runs across the yard out off of the main line, and in case this track didn't hold the train I had to be able to line up these switches.

"Q. How many other switches were there that you might have had to throw if this No. 3 had not been long enough to contain your train?

"A. Possibly three or four.

"Q. What switches were they?

"A. There was the lead switch to No. 3. I would have had to throw it because it was always lined up with the cut-off switch; and possibly No. 4 track or No. 5. Probably the switch might have been headed into the roundhouse track and I wouldn't have wanted to go over there.

"Q. You testified here yesterday that that was the first time you were ever in on this No. 3 track?

"A. Yes, sir; the first time I had ever put a train on No. 3 track.

"Q. You say you didn't know its length?

"A. No, sir.

"Q. You didn't know how many cars it would hold?

"A. No, sir.

"Q. What was the extent of your train?

"A. I don't know exactly how many cars we had. We had a pretty good train though.

"Q. Was it a through freight from Memphis?

"A. It was not a through freight; it was a local freight, but we picked up all the cars that were coming that way. They said we were the only crew coming this way and we picked up everything that was coming. Had a pretty good train.

"Q. At the rate of speed it was going just tell the jury whether or not it was dangerous for you to try to get on there, apparently dangerous.

"A. No, sir. With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still.

"Q. It was stated that you were warned at Forrest City about getting on this step, and that you got on it at a great rate of speed.

"A. Why, there wasn't anyone said anything like that.

"Q. Now you have heard the testimony of Mr. Vaughan and Mr. Kilpatrick and Mr. Cuneo, and probably some others, that you said that you suffered this injury by slipping off the step. Did you tell them that?

"A. I told them, each and every one of them, every time they talked with me about it that I stepped on the step of the engine and it gave way with me and I fell off" (Rec., pp. 93, 94).

Plaintiff testified as to how a new yard should be built, how it should be filled in, and showed he had had considerable experience in such work (Rec., pp. 96, 97).

DEFENDANT'S EVIDENCE.

A. C. ROBKINS: Was master mechanic of defendant's road at the date of the accident. He was informed of the accident when the engine rolled into the roundhouse. (Does not state *when* this was.)

"Did you examine the step? Yes, sir." It was all right, sound (Tr., p. 92). (He does not state *when* he examined it.)

MR. McKEISER: A machinist in roundhouse of defendant; as such he repaired engine No. 5; worked on the engine "as near as I can remember about six or seven hours." I don't remember how long after the accident — but the next morning. I don't remember making any repairs on the step. When there was a rush I had someone else to help me (Tr., p. 84).

Cross-examination:

Mr. Robkins was master mechanic. I was not running the shop. Mr. Robkins was. There were twelve or fifteen men employed in the roundhouse; I was the only machinist; I had a couple of darkies helping me; one of them is in the roundhouse yet; I don't know where the other is. I had no particular reason to examine the step. I took a casual glance at it. I did not go at it the first thing in the morning. I can't tell about what time I examined it. I made no record when I commenced. The record shows I worked six or seven hours

on the engine, but would not show when I began; have not examined the record. It would not show when I began nor when I ended. I finished about 4 o'clock in the afternoon. I was off from 12 to 1 o'clock at noon (Tr., p. 85).

No other employee of the roundhouse was produced as a witness; no record showing work was introduced.

R. A. VAUGHAN: A young man connected with defendants went to plaintiff, while in the hospital, and took a written statement — not verbatim — in which he stated he slipped. He did not say how he slipped or what made him slip. His alleged statement does not contradict his testimony given at the trial (Tr., p. 49).

TOM CUNEO: Was on the engine when the injury occurred, but did not see plaintiff when he was hurt.

This witness was an ex-employee and attempted to cover the case for defendant. He says (Tr., p. 55) that the yards had been in six or eight months before the accident. He was then led back by counsel to say it was only about one month. He constantly contradicted himself (Tr., pp. 59, 60). The jury evidently gave little weight to his evidence.

On cross-examination he said:

"Q. When you came up to him that night, you saw him plainly did you?

"A. Yes, sir.

"Q. Did you run him down?

"A. No, sir.

"Q. You saw him, didn't you?

"A. I did, standing still.

"Q. You didn't attempt to run over him?

"A. Certainly not.

"Q. You didn't think he was in any danger did you?

"A. No, sir.

"Q. You were running very slowly weren't you?

"A. Yes, sir.

"Q. In railroad language when you speak of a high rate of speed, were you running at a high rate then?

"A. No, sir; very slow.

"Q. It is customary for a brakeman to swing on to the engine when they are running at a slow speed, isn't it?

"A. Yes, sir" (Rec., p. 56).

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"Q. Did you ever see brakemen jump on this step before?

"A. Yes, sir.

"Q. Is it customary?

"A. Yes, sir; when they make pilot-bar couplings.

"Q. Is it customary when they ride up to line up the switches?

"A. They seldom ever get on there.

"Q. They do it sometimes, don't they?

"A. Sometimes, yes, sir" (Rec., p. 56).

"Q. You didn't think there was anything unusual seeing him standing there?

"A. No, sir.

"Q. Did you think there was anything very unusual in seeing him trying to get on there?

"A. He was standing in the clear and I was in the engine looking at him. He just took a step right over and stepped on this little step.

"Q. You mean he was standing on the outside of the railroad irons or rails?

"A. Yes, sir.

"Q. And when the pilot came opposite him he made a step to get on this little step?

"A. Yes, sir.

"Q. You couldn't see whether he made it or not?

"A. No, sir; you couldn't see that.

"Q. You couldn't see him?

"A. No, sir.

"Q. Did you know he fell?

"A. No, sir; not until he hallooed.

"Q. Did you have any conversation with him right away?

"A. No, sir.

"Q. How long did you stay there with him, or did you stay there at all?

"A. Not over two minutes.

"Q. You just left him there?

"A. Yes, sir.

"Q. He was lying on the ground when (you) left?

"A. Yes, sir.

"Q. Lying on the ends of the ties?

"A. Yes, sir" (Rec., pp. 56, 57).

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"Q. Was it anybody else's duty to inspect that engine?

"A. They have an inspector at the shop.

"Q. At what shop?

"A. The Choctaw shop.

"Q. Here at Argenta?

"A. Yes, sir.

"Q. Do they have an inspector at Hopefield besides the engineer?

"A. No, sir.

"Q. Who is the inspector over there at the shop?

"A. I don't know him. I am not working over there" (Rec., p. 57).

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"Q. Mr. Cuneo, is it not a fact that if a brakeman would jump on that cowcatcher and not get injured it wouldn't excite any railroad man's attention whatever?

"A. I don't know that it would excite every man.

"Q. Is it not a fact that a railroad man would pay no attention to it?

"A. I paid attention to it" (Rec., p. 58).

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"Q. Jumping on at that speed wouldn't have attracted any special attention if he had not gotten hurt?

"A. No, sir.

"Q. How long had you been an engineer?

"A. About thirteen months.

"Q. What are you doing now?

"A. Nothing" (Rec., p. 58).

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"Q. Where is that engine?

"A. On the west end somewhere.

"Q. Do you know how old that engine was?

"A. No, sir.

"Q. Don't you know that that engine had no rear step at all?

"A. I don't know; all of those engines have steps on the back.

"Q. Is it not a fact that this engine didn't ever have any?

"A. All freight engines have got them.

"Q. Was that a freight engine at that time?

"A. Yes, sir.

"Q. Wasn't it a passenger engine?

"A. It was a freight when it was brought down here.

"Q. Was it built for a freight engine?

"A. It was built for a passenger engine" (Rec., pp. 58, 59).

A. M. McAVOY: Was roadmaster for defendant. The yards at North Little Rock was put in during October, November, and December — finished in December. The track was not filled in between the ties at the date of this injury. It has since been filled in; we filled it in in September and October last. It was our intention to make it something like level with the top of the ties (Tr., p. 62).

"Q. Did you fill in between the rails on all of these tracks?

"A. I wouldn't say all of them. We surfaced the yard and filled it in the best we could with the material we had. In order to surface the yard, we filled in between the tracks and put it in as good condition as we could, and after the yards were settled we hauled dirt and filled in.

"Q. On all of these tracks?

"A. I think so; I wouldn't be positive.

"Q. In order to surface the yard, you dug in between the tracks and threw dirt in?

"A. I said we hauled dirt there and threw in.

"Q. Was anything done to it after you completed it in December until this man was injured on the 6th of February?

"A. Not until last summer" (Rec., p. 62).

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"Q. Wouldn't it make it all the more substantial if you had filled in between the ties with cinders and dirt?

"A. No, sir; it would go down in mud. It wouldn't drain.

"Q. Wouldn't that make it a more substantial track?

"A. Yes, sir; after it became settled" (Rec., p. 63).

JOE MEYERS: Was the fireman on the engine when the plaintiff was injured. Did not see the accident. Examined the step at 8 o'clock next morning and found it perfectly tight.

"Q. You say you were engineer on the night of the accident?

"A. No, sir; I said I was fireman.

"Q. You have been promoted since?

"A. Yes, sir.

"Q. You are engineer now?

"A. Yes, sir.

"Q. How long have you been an engineer?

"A. About four months.

"Q. Did you ever see the head switchman get on this little step when he was coming into the yards?

"A. Yes, sir.

"Q. If there had been other switches to throw, it would have been nothing unusual for him to jump on to this step and ride to the other switch?

"A. Well, if he had had to do other duty there.

"Q. But you claim he had no other duty?

"A. No, sir; his next duty was behind the engine.

"Q. If he had any other duty he ought to have been back on the step?

"A. Yes, sir.

"Q. Did this engine have any step in the rear?

"A. I think it did.

"Q. Don't you know that it did?

"A. I couldn't say.

"Q. It was an old passenger engine wasn't it?

"A. Yes, sir; I think it was.

"Q. Is it not a fact that these passenger engines don't have a step on it?

"A. Not on passenger engines, but I think this engine had a step on it.

"Q. You would not swear to that positively?

"A. No, sir.

"Q. How far in on switch No. 3 had your engine gone at the time this man was hurt?

"A. It was about ten feet from the points.

"Q. What were you doing?

"A. I was shutting the lubricator off.

"Q. Which side were you on?

"A. I was on the left-hand side.

"Q. He was on the right-hand side?

"A. Yes, sir.

"Q. Did you see him?

"A. No, sir.

"Q. Did you hear his halloo?

"A. Yes, sir.

"Q. Didn't you get down to see him?

"A. Yes, sir.

"Q. How long did you stay with him?

"A. About five minutes.

"Q. Then where did you go?

"A. I got back in my engine.

"Q. Where then?

"A. Went to the roundhouse.

"Q. How far away was the roundhouse?

"A. About a thousand feet.

"Q. He was lying on the ground that night?

"A. Yes, sir.

"Q. You stayed with him about five minutes, and that is all you saw of him?

"A. Yes, sir.

"Q. He was in great pain wasn't he?

"A. Yes, sir; he was in pain.

"Q. He didn't undertake to say exactly how he got hurt, did he?

"A. He only said when they asked him, that he slipped off the step.

"Q. Did you make a report to the company in writing?

"A. I signed the engineer's report.

"Q. Did he undertake to describe how he got hurt?

"A. No, sir" (Rec., pp. 71, 72).

R. W. HAINS: Was flagging on the caboose when plaintiff was injured. I did not see the accident. After the accident I was made a brakeman. He testified to the duties of a brakeman (Tr., pp. 73, 74), though he had never broke

at the date of the injury. He was a willing witness for the company, and secured most of his knowledge from the "book of rules."

HILLIARD GRAVES: Was a brakeman on the train when plaintiff was injured. I did not see the injury, but saw plaintiff in three minutes afterwards. He said he tried to get on the footboard of the pilot and fell.

"Q. Were you on that step any time that day?

"A. I remember getting on it once at Palestine.

"Q. Is that east or west of Little Rock?

"A. That's east of Little Rock.

"Q. What occasion did you have for stepping on it?

"A. We generally step on it to ride in. We were heading in.

"Q. Did you get on there to make a coupling?

"A. I got on there to ride in and make a coupling. We were heading in for the passenger train.

"Q. What was the condition of the step at that time.

"A. Well, it looked all right to me at that time.

"Q. Did it feel all right?

"A. I didn't pay much attention to it.

"Q. Where was this step?

"A. There was one on the left-hand side and one on the right-hand side.

"Q. Don't you know that there is no step except on the right-hand side of an engine?

"A. I think there were two" (Rec., p. 78).

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"Q. Had you been warned by your brother not to get on that step?

"A. Yes, sir, he told me about catching on the step in front of an engine that way.

"Q. Did he tell you that the step was in bad condition?

"A. Why, he told me that none of those steps were safe to get on, No. 5, and other small engines.

"Q. Did he caution you about that particular engine No. 5?

"A. That was the first day we came out on No. 5.

"Q. Didn't he warn you not to step on No. 5?

"A. I was warned to be cautious about getting on all of those pilots.

"Q. Didn't you say a while ago that you were warned especially about No. 5?

"A. Yes, sir, he warned me about all of those small engines, and more particularly about these large engines. That No. 5 was a new engine, that was the first time I had ever seen that engine or handled it, to be on a train with it" (Rec., pp. 78-79).

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"Q. It is a very customary thing for brakemen heading into yards to jump on that pilot step and ride in isn't it?

"A. Yes, sir.

"Q. If an engine was moving at a slow rate of speed, it is not very dangerous is it?

"A. No, sir.

"Q. It is not dangerous?

"A. No, sir, unless a person's scared of it, it's like playing with fire, it's liable to hurt you.

"Q. You didn't see Tom hurt?

"A. No, sir.

"Q. You say that he said that he jumped on this step and was hurt?

"A. That's what he said.

"Q. He was suffering a great deal and didn't talk much?

"A. No, sir.

"Q. You didn't worry him much about the details?

"A. No, sir, I just helped to carry him to the hospital.

"Q. You didn't ask him whether it broke or not?

"A. No, sir, only I asked him how he got hurt.

"Q. How long did you say you had been working for this road?

"A. I went to work the 13th day of September, 1892. That was my first trip.

"Q. How long had you worked before the 6th of February?

"A. I was employed by the company from along in October, 1897, up to that time; I had been off between.

"Q. Do you know the general custom as to head brakemen riding into yards?

"A. Yes, sir.

"Q. Was it customary for the head brakeman to jump on this step on the pilot and ride into the yards to line up the switches?

"A. Yes, sir, we always thought that was our duty" (Rec., p. 79).

S. H. BARNES: Was train dispatcher for defendant. Had only been in the employ of the company for thirty days

prior to the injury. His office was in south Little Rock, and he knew nothing of the facts in the case but undertook to testify as to the duties of brakemen (Tr., pp. 81-83).

F. C. WEAVER: Was running a freight train. Made only one trip with plaintiff December 20. His testimony has little or no bearing on the case (Tr., p. 87).

I. M. WIGHTMAN: Was general yardmaster:

"Q. In the discharge of his duty, is the head brakeman coming into the yards—is there any duty for him to perform which requires or is necessary for him to stand in front of the moving engine and attempt to step on that small step attached to the cowcatcher?

"A. No, sir, there wouldn't be unless he was heading onto a car.

"Q. Then what is his duty?

"A. When it comes up to the car he is supposed to get in front and make the coupling.

"Q. How near the car?

"A. Well, I don't know exactly. As a general thing he gets on at ten or fifteen feet from the car.

"Q. He is supposed to get on the step at ten or fifteen feet to make a pilot-bar coupling?

"A. Yes, sir" (Rec., pp. 88-89).

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"Q. If there hadn't been room on that switch, wouldn't he have to throw a switch down there to let the train in on the lead track?

"A. If there wasn't room at the lower end, it is owing to how many cars it would hold. That switch will hold thirty-seven cars.

"Q. If there had not been room on that third switch, wouldn't the head brakeman have to throw two or three more switches down below?

"A. One.

"Q. Wouldn't he have to throw the switch where No. 3 joins onto the lead?

"A. Yes, sir.

"Q. And he might have had to throw No. 4?

"A. Might have had" (Rec., p. 89).

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"Q. You have been in the employ of this road since 1894?

"A. Yes, sir.

"Q. You came down from the west division?

"A. Yes, sir, I came from Shawnee.

"Q. I will ask you if when a man gets on the front end of the engine to make a coupling if he doesn't get on twelve or fifteen feet before it comes to the car?

"A. Yes, sir, generally, and places his pin on to the car he is coupling to.

"Q. Then as a matter of fact they usually get on this pilot before the engine stops entirely?

"A. There has been a rule that they couldn't do it.

"Q. I am not talking about the rule, is it not a fact that they do do it?

"A. Yes, sir, some men do.

"Q. Is it not a common thing for them to jump on this step ten or fifteen feet before they come to a stop?

"A. If they are going very slow.

"Q. If they are going slow is it safe?

"A. Sometimes it seems not to be, but a man takes his chances" (Rec., p. 90).

A. H. KILPATRICK: Was claim agent; says plaintiff told him he went to get on the pilot and slipped (Tr., p. 92).

BRIEF.

The principles of law involved in this case have been so often considered by this and other courts of last resort, that we feel it a work of supererrogation to attempt to enlighten the court. There can be now little dispute upon the propositions that it is the duty of the master to provide a safe place and safe machinery in which and with which the employee is to work; that this is a positive duty resting upon him which he cannot avoid by turning it over to another employee; that on the other hand the master is not an insurer and does not guarantee that the place and machinery shall be absolutely safe; that the master is bound to take reasonable care and make reasonable efforts; and the greater the risks which attend the work to be done and the machinery to be used, the more imperative is the obligation resting upon him; that the servant himself must use due care; that he assumes the risks and dangers incident to his employment that are obvious and apparent; that the servant is not bound to make an examination or inspection to find defects; he is not bound to search for dangers except those risks that are patent and obvious to the senses or ordinary observation.

With the principles of law so well known and settled, it seems to us that all that is left for the court is to see that the charge of the learned trial judge to the jury was in accord with these principles of law and then to see if there was evi-

dence — whether conflicting or not — sufficient to justify the jury as reasonable men in bringing in a verdict for the plaintiff.

And in viewing the testimony this court will look at the acts of plaintiff, in determining whether he was guilty of negligence or not, from the standpoint of "a man of ordinary prudence in the same calling and under the circumstances in which plaintiff was placed," using the language of Justice Harlan in 128 U. S., 94. What would seem to your honor imprudent, dangerous or hazardous would to a man in the same calling be perfectly safe. While it might be gross negligence in a lot of sedate judges, learned statesmen or college professors, to enter in a game of baseball or football, or to go rowing in a frail racing scull, yet to a lot of college athletes it would be perfectly prudent and safe.

As was intimated by Chief Justice Fuller in 159 U. S., 611, the care for a man's personal safety, the love of life, the principle of self preservation, are enough to keep a person of sane mind from recklessly exposing himself to such danger or peril as would amount to such negligence as would justify the court in declaring, as a matter of law, that it was negligence *per se*.

With Tom Tennessee's experience as a brakeman, could any sensible man in the same calling have said in advance of the injury that he was reckless or exposing himself to an obvious and certain danger when he attempted to board the pilot step? He tells us (Rec., p. 94): "With an engine running at the rate of three or four miles an hour it is not any more dangerous to get on the step of the pilot of an engine than it is to get on it standing still. It is a customary thing

with all brakemen to get on these steps running at that rate. It is not any more dangerous than on an engine standing still."

Even Tom Cuneo, the most willing witness for the railroad, says (Rec., p. 58) that plaintiff's jumping on the pilot at the slow rate of speed the engine was moving attracted no special attention; that he paid no attention to it; that he had seen other brakemen jump on this step (Rec., p. 56).

The yardmaster, I. M. Wightman, says: "It is a common thing for brakemen to jump on this step ten or fifteen feet before the engine comes to a stop" (Rec., p. 90).

Other witnesses testify to the same thing, but why should we waste time on questions where the evidence was at least conflicting and the jury has passed on it in our favor?

We will attempt to follow appellant's counsel briefly in the order adopted by them in their brief.

Alleged Defective Condition of Step.

(Page 21 of Appellant's Brief.)

Counsel attempt to review the evidence on the condition of the step. The contradictory statements of Cuneo, his manner of testifying, entitled his testimony to very little weight before the jury. He claims to have inspected the engine and found it all right. He says the company has an inspector at Argenta but none at Hopefield. He could not tell who the inspector was (Rec., p. 57), neither was he ever introduced as a witness. No record of any inspection was introduced. It was merely the casual inspection of trainmen and of two of the shop men whose testimony we shall refer to later.

Counsel next take a brief excerpt from plaintiff's evidence. He says he did not know there was anything the mat-

ter with the step when he got on it (Rec., p. 30). He "knew his foot went down. It did not slip that way; it went straight down" (Rec., p. 37).

The counsel for appellant handled A. C. Robkin, the master mechanic, very gingerly. He did not state *when* he examined the step, or *when* he found it all right. No record was produced; no effort was made to show the previous history of the step, its construction, or age or its previous condition. His testimony does not cover a half column in the record. He was the man above all others who ought to have been able to shed most light on this issue.

The next witness whose evidence is noticed is Mr. McKeiser, a machinist. He did not produce his record; did not know when he went to work on the engine — (not before 9 o'clock if he worked six hours and quit at 4); he had no reason to notice the step — there was no complaint of it; he had a couple of "darkies" helping him; there were twelve or fifteen hands in the shop; he took a "casual glance" at the step (Rec., p. 85). No one else from the shop or roundhouse testified; the "darkies," helpers to the machinist, were not called at all. The mere fact that the evidence shows the company had an inspector at Argenta, whose special duty it was to inspect these appplianees, and that he was not called, shows that no such inspection was made as the law requires.

HILLIARD GRAVES was on the step at Palestine, near the Memphis end of the road: "*We generally step on it to ride in.*" The step looked all right then. I didn't pay much attention to it. On cross-examination he stated that he had been warned by his brother that the step on this No. 5 engine, and other small engines, was not safe. No. 5 was new to me;

it was the first time I had ever been on the train with it (Rec., p. 78, 79). The testimony of Vaughan and Kilpatrick that plaintiff said he had slipped off does not contradict him. He says the step went down and that caused him to slip (Rec., p. 36). Appellants say that there is not a word of evidence to sustain any charge of negligence as to the step.

We claim there was ample evidence to sustain a finding of the jury that the step was unsafe.

First, it was an old passenger engine, changed into a freight; it was brought down here from the western division. There was no evidence introduced by defendant to show its history, how old it was, or how long it had been in use (Rec., pp. 23, 42, 58, 59). These facts were peculiarly in the knowledge of defendant.

Second. The step was fastened to the wood and hence was liable to get out of fix by natural wear and tear (Rec., pp. 23, 24).

Third. Wesley Graves testified that some three or four days before this injury he saw this step and cautioned his brother not to catch on to that pilot, that the footplate was *loose* on it (Rec., p. 41). That the inspector could have seen it (Rec., p. 42); that he went to look at it early next morning after the accident and that it was not there (Rec., pp. 24, 42). This corroborates plaintiff's evidence that the step went down and that he did not simply make an effort to get on to a sound step, securely fastened and then slipped, as defendant contended was the case.

And lastly, *Res ipsa loquitur.* A sound step, properly constructed and fastened, does not go down when stepped upon. If the breaking or giving away of the step was not

prima facie evidence of negligence it certainly was *prima facie* evidence of a weak or unsafe condition of the step. See

57 Ark., 435.

54 Ark., 209.

61 Id., 381.

28 L. R. A., 596.

We think a reasonable theory for the jury was this: The step was old and infirm. It was fastened to wood and by natural wear and tear came loose; it was perhaps tightened up between the time Wesley Graves saw it loose and the fatal trip to Memphis. It might have been *apparently* safe at Hopefield and Palestine. The jarring, the use and bad weather might have assisted in getting it loose by the time it got into Argenta, particularly so as it was an old engine that had seen much use. The famous "One Horse Shay" went all to pieces at once. Everything human and of human construction must have its day of dissolution — a time when it must come to an end. It was the railroad's duty to prevent, by constant inspection, the state of facts that happened to plaintiff.

There is not necessarily any conflict of evidence between the statement of Tennessee and appellant's witnesses on the condition of the step after the accident. Tennessee says "it went down" with him. Wesley Graves says early next morning it was not there. Appellant's witnesses do not fix definitely the time when they examined the step after the accident with the exception of Cuneo. There was an *interim,* in the early morning, when some of the ten or fifteen employees in the roundhouse may have taken the step off and replaced it, so that when McKeiser, the machinist, saw it, it was sound or

appeared sound. The jury had to disbelieve both plaintiff and Wesley Graves or find that the step "went down" or was removed from its fastening. This was a mixed question of fact for the jury.

There was certainly no such showing made of the inspection, and the condition of the step as was shown in Davis v. Ry. Co. in 53 Fed. Rep., so confidently relied upon by appellant.

The alleged negligence as to the condition of the track at the place of injury.

(Page 28 of Appellant's Brief.)

The argument by appellant's counsel upon this branch would have been proper for the jury; but they have heard it, and considered it and decided against appellant. Counsel say: "It cannot be said, as a matter of law, that it is negligence to use a track before the spaces between the ties have been filled in." We make no such contention; it is a question of fact for the jury to say under all the circumstances of the case whether it is negligence.

Plaintiff says: "It is the general rule to fill in the tracks up level with the top of the ties so there will not be any holes or anything for a man's foot to get caught in while coupling and uncoupling cars. All the yards are filled in perfectly level as a rule" (Rec., p. 30).

Again plaintiff says: "If the yard had been filled in level I could not have got my foot caught. If the track had been filled in level and I had slipped off, I could have caught myself; there would have been no hole to get my foot caught in" (Rec., p. 31).

WESLEY GRAVES says, if the yard had been filled in the pilot would have only been about three inches from the surface (Rec., p. 43). Any sensible man knows if the ties had been filled in that it would have been impossible for his foot to have got caught. His foot was caught and plaintiff lost his leg. McAvoy, appellant's roadmaster, admits that this yard has been filled in since the accident and that it is necessary and usual after the road settles (Rec., p. 62). His contention that it did not make the roadbed more substantial to fill it in with cinders and dirt was so improbable that the jury evidently did not take much stock in his statement.

Our Saxon ancestors had what was known as the trial by ordeal (4 Blackstone, 342). The accused was permitted to walk blindfolded, over nine redhot plowshares, laid lengthwise at unequal distances; and if the party escaped being hurt, he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty.

Now, we submit that the contention of the appellant bears some similarity to this trial by ordeal. The railroad, whose duty it is to provide a reasonably safe place, where its servants may walk at all hours of the day and night, in fair weather as well as in foul, provides a series of mantraps and places its employees to work thereon; the skeleton track, where the ties, unballasted and unfilled, present a place where the fate of the employee may prove as uncertain as the Saxon suitor; so long as the servant performs his duty on these tracks he is innocent; but as soon as he gets caught, and loses his leg, then he is guilty of contributory negligence.

Justice Battle, in Ry. Co. *v.* Leverett, Admr., 48 Ark., 346, a well considered case, says: "In employing the deceased, the appellant assumed the duty of exercising reasonable care and prudence to provide him a safe place and tools to exercise the employment, and to maintain the place and tools in a reasonably safe condition, during the time for which he was employed; and the deceased assumed the risks and hazards which ordinarily attend or are incident to the service he was engaged to perform. The negligence of appellant to supply a safe roadbed or place and tools for the deceased, was not a hazard and risk usually or necessarily attendant upon or incident to the performance of his contract; nor was it one which the deceased, in legal contemplation, is presumed to have assumed, for the obvious reason that he was to use such roadbed, place and tools as were to be provided by appellant, and had and was to have nothing to do with constructing the roadbed and place, and purchasing the tools, or with the preservation or maintenance of such roadbed and tools in suitable condition after they were supplied. This risk is not within the contract of service. If it was, appellant would have been relieved of all pecuniary responsiblity for failing to perform the obligations he had assumed. Such a doctrine would be subversive of all just ideas of the obligations arising out of such contracts of service, and would withdraw all protection from such employees. A doctrine that leads to such results is contrary to reason, and unworthy the sanction of any court."

Tennessee's knowledge of the condition of the yard.

(Page 30 of Appellant's Brief.)

Plaintiff was informed by the yardmaster that the new yards were completed and ready for use (Rec., pp. 33, 39). He had a right to rely upon the fact that the master had done his duty, had provided him a safe place whereon to work; he did not have to investigate or inspect or look for dangers. He never was on track No. 3, where he was hurt, till the night of his injury (Rec., p. 39).

He says he had never gone out of the new yard more than three times (Rec., p. 33) and then generally by lantern-light; that he did not know the condition of the track; "I could not look at the new yard and watch my business;" "I think part of the tracks near the lead track were filled in" (Rec., p. 33). Plaintiff very frankly admits that if he had examined the yard at suitable times he could have seen the condition of the ties; but the law does not cast this duty upon him. He has a right to act upon the presumption that the master has done his duty. He says he did not know the condition of the track where he was hurt; did not see it till he was left on the cold damp ground on the night of the 6th of February, to observe it by the light of his lantern, as he quietly and patiently suffered from his wound.

The tracks were extensive. There were eight tracks besides cross tracks and switches; they were separated from each other by quite a space and these side tracks were sometimes filled with cars when plaintiff had gone in and out, thereby obscuring his view, and limiting his facilities for observation.

Was Tennessee in the proper place in the discharge of his duty at the time of the accident?

(Page 38 of Appellant's Brief.)

The testimony in this, as well as the adjudged cases, shows it is a common practice for the head brakeman to ride this pilot, both when coupling and when throwing switches. Plaintiff says he never had a book of rules; that he knew of no rule against stepping on this pilot (Rec., pp. 36, 47). "I have got days for not being on the front end of the engine; I mean by that they would pull me off from my work and lay me off ten or fifteen days as a punishment for not riding on the front end" (Rec., p. 48).

WESLEY GRAVES says the place for a head brakeman to ride is on the footplate of the pilot; that this was the customary place and the proper place. I am in the habit of doing it and do it up till this day (Rec., p. 43).

JOE CUNEO, a witness for defendant, says it was customary for brakemen to jump on this step (Rec., p. 56).

JOE MEYERS, one of the star witnesses for the defendant, was asked:

"Q. Did you ever see the head switchman get on this little step when he was coming into the yards?

"A. Yes, sir."

It would have been nothing unusual if he had had to do other duty there (Rec., p. 71).

HILLIARD GRAVES, another witness for appellant, says it is a very customary thing for a brakeman heading into yards to jump on the pilot step and ride. If the engine is moving at a slow rate of speed, it is not very dangerous. It

was customary and we always thought that was our duty (Rec., p. 79).

Counsel quote, in their brief, two and one-half pages from the testimony of one Barnes, a train dispatcher, and then invite the court to still further feast upon his evidence. He was like one of the Rulers of the Queen's Navy that stuck close to his desk and never went to sea. He had been with the defendant company less than thirty days; his office was on the south side of the river from these yards; he never went to instruct the men in person; his duties confined him to his office. We apprehend that this court will give no more weight to his evidence than the jury did.

I. M. WIGHTMAN, the general yardmaster of defendant, says that if the head brakeman was heading on to a car it would be his duty to get in front of the moving engine and get on the pilot step ten or fifteen feet before it reached the car (Rec., pp. 88, 89).

He stated that there might have been contingencies where plaintiff would have had other duties to perform after passing by switch No. 37 (Rec., p. 89). To the same effect is plaintiff's evidence (Rec., p. 93).

Appellant's counsel say Tennessee has established no necessity for attempting to mount that step on this occasion. He was acting in good faith, believing he was doing his duty; it was a dark winter night; the yard was new to him; he did not know the length of the tracks; he did not know how many switches he had to throw. As to whether plaintiff knew the condition of the track, or was in the discharge of his duty, or was it dangerous to step on the pilot, or whether there was a rule against it brought to the notice of plaintiff, or whether

the rule was habitually disregarded, are all questions for the jury. The jury has resolved them all in favor of plaintiff. The trial judge who saw the witnesses, and observed their mode of testifying, and saw all the phases of this case that cannot be reproduced upon the record, refused to direct a verdict for defendant, but submitted the question to the jury. We submit that under our system of jurisprudence their verdict should not be disturbed.

AUTHORITIES.

Every issue involved in this case was a question for the jury.

We have collected some of the leading cases bearing upon this question.

In Patton *v.* T. P. Ry. Co., 179 U. S., 658, Justice Brewer says:

"It is undoubtedly true that cases are not to be lightly taken from the jury; that jurors are the recognized triers of questions of fact, and that ordinarily negligence is so far a question of fact as to be submitted to and determined by them, hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of the testimony, but one who, in our jurisprudence, stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and so rules by instructions to that effect, an appellate court will pay large respect to his judgment."

In Washington Ry. Co. *v.* McDade, 135 U. S., 572, Justice Lamar says:

"Upon every question in the case — the safety or unsafety of the machinery, the ignorance on the part of the plaintiff at the time of the accident, the evidence was controverted and rendered the case just such a one as this court in Jones *v.* East Tennessee Ry. Co., *supra*, said that 'a due regard for the respective functions of the court and jury would seem to demand that these questions should have been submitted to the jury. In the language there used, we see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others." Citing

Dally *v.* Am. Printing Co., 150 Mass., 77.

Myers *v.* Hudson Iron Co., 150 Mass., 125.

In Jones *v.* E. T., etc., Ry. Co., 128 U. S., 443, plaintiff sued for being run over by an engine of defendant's company. The trial judge held that while there was evidence of negligence on the part of the railway company in running its trains at too great a speed, yet the defendant was guilty of contributory negligence and directed a verdict for the defendant. Mr. Justice Miller reversed the lower court, saying:

"It did not, therefore, permit the jury either to pass upon the negligence of the defendant company or the contributory negligence of the plaintiff. * * *

"But we think these are questions for the jury to decide. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.

"Instead of the course here pursued a due regard for the respective functions of the jury would seem to demand that these questions should have been submitted to the jury, accompanied by such instructions from the presiding judge as would have secured a sound verdict."

In Kane *v.* N. C. Ry., 128 U. S., 94, Mr. Justice Harlan says:

"But in determining whether an employee has recklessly exposed himself to peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be had to the exigencies of his position, indeed to all the circumstances of the particular occasion."

The case was reversed with instruction to submit to the jury the question whether "a man of ordinary prudence in the *same calling*, and under the circumstances in which plaintiff was placed," would have done as he did.

"The question of negligence or contributory negligence should not be withheld from the jury, unless the evidence, after giving the plaintiff the benefit of every inference to be fairly drawn from it, so conclusively establishes negligence or contributory negligence, that the court would be compelled, in the exercise of a sound judicial discretion, to set aside any verdict returned in his favor."

Chief Justice Fuller, in Dunlap *v.* Ry. Co., 130 U. S., 652, citing the case of Kane *v.* Ry, *supra*, says: "The circuit court erred in not submitting the question of contributory negligence to the jury, as the conclusion did not follow, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish."

In the B. & O. Ry. Co. *v.* Griffith, 159 U. S., 611, Mr. Chief Justice Fuller laid down the law in the following concise and forcible language:

"Since the absence of any fault on the part of the plaintiff may be inferred from circumstances, and the disposition of persons to take care of themselves and to keep out of difficulty, may properly be taken into consideration (Washington & G. R. Co. *v.* Goldman, 82 U. S. (15 Wall.), 401. It is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by Mr. Justice Lamar in Grand Trunk Ry. Co. *v.* Ives, 144 U. S., 408, 417: 'There is no fixed standard in the law by which a court is enabled

to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. The terms "ordinary care," "reasonable prudence," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the courts.'"

As to whether the yard at north Argenta was properly constructed; as to whether it was in a dangerous condition was a question for the jury. Much of the testimony tends to establish the fact that it was an unsafe place for men to work in that they had to jump off and on their engines at all times of the day and night. It will be conceded, we take it, that side tracks in a depot yard in a city such as this yard is shown to have been, are not properly constructed until the spaces between the ties are ballasted so that a man's foot cannot get down and become fastened between the ties. Tennessee tells us that after his leg was cut off he was allowed to lie on the cold ground by the side of the track for over an hour before he was finally picked up and carried by the railroad to the hospital. During these silent vigils of the night he had ample opportunity with his lantern in hand to observe exactly how the ties were placed and how the track was constructed. He

tells us that the toe and heel of his shoe became fastened under these ties; that the sole of his shoe was doubled up and torn off his foot in his effort to extricate his foot from this trap. He further tells us if this had been filled in as it ought to have been that even had his foot slipped he could have extricated it without injury.

Appellants attempted to excuse the condition of this track on the ground that the yard was new and that it was necessary to allow the ties to settle down before ballasting the same. They put expert testimony on to sustain this contention. We submit that there is no proposition, however absurd, that may be urged by a railroad in defense of a damage suit that they cannot bring expert testimony to sustain. But this testimony at last is submitted to the consideration of an intelligent jury. It is so perfectly absurd to say that a track is safer without ballasting than with it that such testimony carries no weight with it. Besides the testimony on this point is conflicting and it was submitted to the proper arbiter, the jury, for its decision.

Tennessee was not guilty of contributory negligence.

In Warner *v.* B. & O. Ry. Co., 168 U. S., 348, Mr. Justice White, in reversing the trial court which had held as a matter of law that a person going on the trak before a moving train was guilty of contributory negligence, says:

"When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. Grand Trunk Ry. *v.* Ives, 144 U. S., 408, 417, 489; B. & O. Ry. Co. *v.* Griffith, 159 U. S., 603, 611; T. P. Ry. Co. *v.* Gentry, 163 U. S., 353, 368. A like doctrine was thus

expressed by the Supreme Court of Pennsylvania in Pennsylvania Railroad Co. *v.* White, 88 Pa., 327, 333, a case in many respects analogous to the present one.

"Negligence has been defined to be 'the absence of care according to the circumstances,' and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury.

"We think the case presented by the record is not one where the facts inferable from the evidence were such that all reasonable men would, of necessity, draw the same conclusion from them, and the question of negligence was not, therefore, one of law for the court."

It is not negligence *per se* for even a passenger to leave a moving train.

L. R. & Ft. S. Ry. *v.* Atkins, 46 Ark., 423.

St. L., I. M. & S. Ry. *v.* Cantrell, 37 Ark., 523.

Nor is it negligence *per se* for a passenger to board a moving train, but is a question for the jury.

B. & O. Ry. *v.* Kane, 69 Md., 11.

Johnson *v.* Ry., 70 Pa. St., 357.

Swigert *v.* Hannible Ry. Co., 75 Mo., 475.

Stoner *v.* Penn. & Ry., 98 Ind., 384.

Texas & Ry. Co. *v.* Murphy, 46 Tex., 356.

Johnson *v.* Ry Co., 55 Cal., 593.

In O'Mellin *v.* Kansas City, etc., Ry., 21 S. W., 507, the court says:

"When it began to move it was going at the rate of two or three miles an hour, and it had only to move, even at this rate, five feet, before the deceased placed his foot upon the footboard; and we are asked to say that it was such a piece of recklessness in a switchman to make this attempt as to preclude all recovery. The proposition is utterly unreasonable upon its face. While we agree that the negligent and reckless

performance of a duty by one or all the brakemen or switchmen will not excuse one for following their example, we do not agree that it is necessarily negligent for one to step upon a properly constructed footboard of a slowly moving engine by one accustomed to that work.

"It was shown that there was no rule forbidding the brakeman and switchman from getting on these footboards under such circumstances. That daily for eight years it had been done in the presence of the officers of the defendant without a word of reproof or a rule made forbidding it. The circuit court would not have been justified in sustaining the demurrer to the evidence."

In Lockhart *v.* Little Rock & M. Ry. Co., 40 Fed., 632, the plaintiff was riding on the front of the engine on the footboard, and was killed. The company, as usual, pleaded contributory negligence. The learned judge disposed of the plea in language as terse and forcible as it was elegant.

After narrating the facts, he says:

"A switch engine of the Chesapeake road came along on its regular run of business, running at a rate variously estimated at four, six, seven, nine, and ten miles per hour by the witnesses. On it, among others, was the plaintiff's intestate, a switchman, whose duty it was to accompany this engine, riding on the footboard in front of the headbar of the engine, placed there for the use of switchmen. The blaze of the headlight from the Little Rock locomotive further obscured the engineer's vision, and it ran into the loaded cars, mashing the intestate to death.

"Was there ever a more hopeless case against a railroad company? I think not. The contributory negligence insisted on — and always the company lays hold of any circumstances that may be at hand to suggest that defense — was that the intestate did not ride on that part of the footboard at the rear of the engine, where he might have escaped. So he would have escaped if by some factitious circumstance he had not been on the engine at all, or if he had engaged in practicing law, and never had been a switchman at all. It is conceded that when throwing switches or otherwise engaged in front his duty called upon him and permitted him to ride on the front footboard; but it is assumed that because the engine was en route to its work further down the track he

should have ridden in rear while so en route; but by the same reasoning, if the collision through some other negligence of the defendant company had come from the rear, or if the engine in this very case had been running backwards, then the company would have said it was contributory negligence not to ride in front. Always, on this plan of constructing contributory negligence for a bulwark of defense, the unfortunate victim should have been in that place shown by the circumstances to have been the safe place. The court told the jury it need not consider the matter of contributory negligence, and this is clearly so, it seems to me. These switchmen accompanying a switch engine may ride on it anywhere, and cannot, as everyone knows, often tell what they may be required to do in emergencies that may arise. This man may have been wanted in front to couple to these very cars that brought him to his death, for all he might know, if the foreman had been going to drag them out of the way of trains, and he would have been so wanted if they had known they were there to endanger every life borne upon those rails until they were removed. How did he know that the foreman was not engaged in some such errand, en route, or on some other that would call him to the front? I should not dwell on this but for the desperation with which the contributory negligence was pressed at the trial, and the reference to the victim's being out of place, made in the brief on this motion."

In Donahoe *v.* B. & M. Ry. Co., 59 N. E., 663, the defendant urged that plaintiff was guilty of negligence in getting on a moving engine. The court says:

"The plaintiff testified that the place where he attempted to get on was the place where he had been in the habit of getting on. It was for the jury to say, we think, whether the plaintiff was not in the exercise of due care in attempting to get on where he did. It could not be ruled as a matter of law that he was not in the exercise of due care."

It was for the jury to say whether defendant exercised reasonable care in keeping its tracks in a safe condition for its employees to work upon.

Babcock *v.* Ry. Co., 150 Mass., 467.

Donahoe *v.* Ry. Co., 59 N. E., 663.

In Han *v.* N. Y. Central Ry., 21 N. E., 427, the plaintiff, a car coupler, was injured in the yards of defendant, by reason of a defective gutter. The evidence was conflicting but much stronger as tending to show knowledge on part of plaintiff than in the case at bar. The Court of Appeals of New York, through Potter, J., after reviewing the evidence, says:

"Although I might perhaps as a juror have reached a different conclusion in respect to the plaintiff's knowledge, yet as it was a question of fact, in regard to which evidence was conflicting, I am constrained to respect the conclusion of the jury found upon the conflicting evidence, and that this court is bound by the jury's determination of this question of fact."

In Mo. Pac. Ry. Co. *v.* McCally, 21 Pac., 577, the defendant pleaded that the plaintiff could not recover because he had voluntarily assumed a position of great danger by riding on the pilot and thereby directly contributed to his death. The court says:

"The question, then, as to whether or not the position taken by McCally on the pilot beam was under all the circumstances, dangerous, involved an issue of fact that was submitted to the jury, and necessarily passed upon by them in making their general verdict adversely to the railroad company."

The proof in that case, as in this, was conflicting as to whether this was the general custom; whether it was a safe place to ride; whether plaintiff was in the proper place for the discharge of his duties. After reviewing the evidence, the court says:

"It would naturally follow from such proof, first, that the position was not a dangerous one; second, that it was the usual place taken by brakemen in that yard when discharging the duties of switchman."

The court in this case distinguishes it from Ry. Co. *v.* Jones, 95 U. S., 439, and Hough *v.* Ry. Co., 100 U. S., 213, and Kresanowoki *v.* Ry. Co., 18 Fed., 230, where the plaintiffs were not engaged in switching or coupling cars, but voluntarily took positions on the pilot when they should have been elsewhere.

This court, in Northern Pac. Ry. Co. *v.* Nicols, 50 Fed., 723, held that a brakeman stepping in before a moving car going at the rate of four miles an hour, for the purpose of coupling cars, was not negligence *per se*, but was a question for the jury.

PROXIMATE CAUSE.

The fact that Tennessee stood in front of one side of the engine while it was moving towards him, with his cap pulled down, was not the proximate cause of his injury. He says that he stood just inside of the rail as the engine approached him so that he could step upon the pilot as it came up to him. **Cuneo says he was in the clear–outside of the rails (Rec., p. 56).** He was not injured by reason of the glare of the light, nor by reason of being in the way of the engine when it approached him. The light no longer blinded him when he attempted to step upon the pilot. He did not lose his balance until he got on the unsafe pilot step and the step gave way. So that the fact that he was standing on the track in front of the side of the pilot as it approached him, had nothing to do with his injury. The proximate cause of his injury was the step going down with him. Another concurrent proximate cause was the unsafe condition of the track. He was not injured until after he slipped off the step and his foot became fast under

the ties. Then it can be legitimately argued that if the step had not given way his foot would not have gone down. Then, for the sake of argument, we can admit that the step was in a safe and sound condition, and that if he slipped off of it in a safe and sound condition, yet, he would have escaped injury, as he tells us, if the track had been properly filled in. It was not properly filled in and his foot was caught in the trap. After it was caught in the trap he had ample time to think and to execute an effort to withdraw it. But he says he tried as best he could but was unable to extricate it from the ties. He tore his shoe nearly off in the effort and finally realizing the fact that he could not get his foot out and that it would be run over, he threw his body and his right foot outside of the rail and submitted to the inevitable.

THE DOCTRINE OF ASSUMED RISK.

In all of the cases cited by the appellant the doctrine is announced that where the danger is obvious and apparent and the servant is suffering under no disability that he assumes the obvious risks incident to the danger. There can be little dispute over this principle of law. The confusion of cases comes about out of the different views and opinions of juries, judges and courts upon whether the danger is obvious and apparent to the servant or not.

That is the condition of affairs in the case at bar. If Tom Tennessee could by ordinary observation or by the use of ordinary prudence have seen that the track was in a dangerous condition and that he was exposing himself to danger

by working over the same, then he assumed the risks incident thereto and could not recover upon this allegation of negligence.

But he tells us in his testimony that he never was on this particular track before. That he did not know that the ties were unfilled; that he had only made about two or three trips into this yard prior to his injury; that on these occasions it was generally dark; that he was intent upon his duties as brakeman and neither observed the condition of the track nor did he have fair and sufficient opportunities for discovering the state of the track or observing the danger. His testimony upon this point is borne out by other evidence. The question of knowledge then was a disputed question of fact which it was proper to submit to the verdict of a jury. The jury, after hearing the testimony, found for the plaintiff. The trial judge who heard the witnesses' testimony and observed their demeanor upon the stand, refused to take the case from the jury, but submitted this conflicting testimony for their decision. We submit that this court should not disturb their findings upon this state of facts.

The servant has the right to assume that the machinery and implements furnished him by his master are safe and suitable for the business engaged in.

Northern Pac. Ry. Co. *v.* Herbert, 116 U. S., 642.

Smith *v.* Car Works, 60 Mich., 508.

A general opportunity to observe the unsafe machinery, unsuitable rails or defective roadbeds, is not sufficient to bar recovery unless the servant actually knows, or by the exercise of reasonable care should have known, that the danger was apparent.

Devlin *v.* Wabash Ry. Co., 87 Mo., 545.

A conductor had passed under an insufficient bridge for three months and was injured. Held that he was not chargeable with notice of defect.

St. Louis Ry. Co. *v.* Irwin, 37 Kan., 701.

The servant stands on a different footing from the master and hence is not bound to the same degree of care in inspecting and investigating risk to which he is exposed.

Cook *v.* St. Paul Ry. Co., 34 Minn., 45.

Nor is the servant bound to investigate for himself a department with which he has nothing to do and to set up his judgment against that of his masters as to the appliances in use.

Devlin *v.* Wabash Ry. Co., 87 Mo., 545.

The cause of an injury, in cases of his kind, is for the jury.

Pullman Palace Car Co. *v.* Bluhm, 18 Am. & Eng. Ry. Cases, 87.

Before the court can presume as a matter of law that the servant assumes the risk incident to defective machinery, it must appear that he accepted employment with the actual knowledge of such defects or continued in the service after he knew, or in the exercise of reasonable care should have known of same.

Ry. *v.* Keeton, 87 F. R., 849.

Ry. *v.* Miller, 24 So., 955.

O'Neil *v.* Ry., 86 N. W., 1098.

The doctrine of assumed risk has no application when the servant first discovered the defect at the time of the injury.

Ry. *v.* Milam, 50 S. W., 417.

Sackewitz *v.* Mfg. Co., 78 Mo. App., 114.

The servant implied assumption of risk is confined to the class of work for which he is employed.

Ry. *v.* Adams, 23 Am. & Eng. Ry. Cases, 408.

AS TO THE RULES.

The testimony fails to show that Tennessee ever had a book of rules of this defendant; or that any rule was ever brought to his attention; he says he never did (Rec., pp. 36, 47).

Only the conductors and a few other employees received books, and they not until February or March. Tennessee says the only rule he knew of was the standard rule, that employees could not board a moving engine going at a high rate of speed (Rec., p. 47).

But as the rules, if any, were habitually disregarded they were not binding on the plaintiff and cannot bar his recovery in this case.

Northern Pac. Ry. Co. *v.* Nicols, 50 Fed., 721.

Barry *v.* Ry. Co., 98 Mo., 62.

Smith *v.* Ry. Co., 18 Fed., 304.

Leverett *v.* Ry. Co., 48 Ark., 348.

Fay *v.* Minneapolis, Etc., Ry., 11 Am. & Eng. Ry. Cases, 193.

II.

Learned counsel object to the following language used in the court's charge, to-wit:

"What it owes to its employees is to furnish machinery in a reasonably safe place for the servant to work in the discharge of his duties. A failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts or negligence do not contribute to the accident."

It is true that part of the language which relates to the duty of the master when unexplained by other parts of the court's charge has been subject to some judicial criticism. But when the entire charge of the court is considered it will be seen there is no just ground for such criticism in this case, and by applying the charge here to the case to which counsel refer (81 F. R., 679) it will be seen that the objections there made are fully met. The court further on in its charge and in the same connection says:

"It is for you to determine, after giving due weight to all of the testimony, whether you think, in view of the fact that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence, not extraordinary but ordinary diligence, to have filled up this track — the spaces between the cross ties — before the time when the accident occurred on the night of February 5, or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that the roadbed might settle and the yards be drained, as was testified to by one of the witnesses."

It will be seen from this that the court not only gave the correct idea as to the duty of the master in charging that its duty in such cases was the exercise of ordinary care, but this language was emphasized in favor of defendant when the court said "ordinary care was the measure of duty, not extraordinary care."

Again, further on in the same connection, the court said:

"Now, if you find that it has exercised due diligence, such as any ordinarily reasonable man would exercise in matters of that kind, then they would not be liable.

"But on the other hand, if they had not and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so for as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employees' safety, regardless of his own negligence."

In this case, however, the language used without qualification in other parts of the charge is not objectionable because the proof shows that the yard had been in a defective condition ever since its construction some time in December before the plaintiff was injured in February, and that no such inspection as the law requires had been made as to the step. In such cases it has been uniformly held that the language used by the court is not objectionable.

Pierce *v.* Clavin, 82 F. R., 552.

Bussey *v.* Charleston & W. C. Ry. Co., 11 Am. & Eng. Ry. Cas., 474-482.

Portland Gold Mining Co. *v.* Flaherty, 111 F. R., 317. Pamphlet December 3, 1901.

Ry. *v.* Gainus, 46 Ark., 570.

The court in 111 F. R. at page 317, *supra,* said: "Defendant next complains of the following portion of the court's charge to the jury, namely: 'It was the defendant's duty to use ordinary care to furnish the plaintiff a safe place in which to work, so as not unreasonably to expose him to unnecessary danger in the doing of his work.'" Counsel contend that the court should have qualified the word "safe" as here employed by the adverb "reasonably," and not

having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

The court told the jury that the obligation resting on defendant was "to use ordinary care" to furnish a safe place so as not to "unreasonably" expose him to unnecessary danger. The liability of the defendant is here so carefully qualified by expressions denoting the requisite care that it is hardly conceivable that the jury could have been misled by the verbal omission. Moreover, the vice, if it be one, was cured by the immediately following context, namely: "This duty to use ordinary care, generally is not equivalent to insurance. The defendant was in no sense an insurer of plaintiff's safety. Defendant had to use that care that a reasonably prudent man would use under similar circumstances." The charge as a whole, on this point, was substantially correct.

Not only so, but the error, if any, was immaterial and unprejudicial. It already appears that defendant practically admitted at the trial that it did not furnish plaintiff a reasonably safe place to work in. As already observed, defendant made no issue of that kind, but contended that it never ordered plaintiff to work in the upraise, for the very reason that it was so filled with bad air as to be dangerous.

The engine was furnished Davis, the engineer, and it was not the duty of the plaintiff as fireman to look after it;

and if it was defective and the plaintiff thereby injured, the defendant is responsible.

Ry. *v.* Pughsly, 39 S. E., 473.

In Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326, it was insisted that while it was the duty of the railroad to keep the track in a safe condition, yet as the plaintiff knew there was wood scattered along the track, near wood piles on the road, that he assumed the risk of stumbling over wood on the track where he was injured, although he did not know of it. The court held that general knowledge of the track at other places did not preclude him from recovering for an obstruction at the place where the injury occurred, and that the question of contributory negligence was properly left to the jury.

It is the duty of appellant to have and maintain good and safe machinery, structures and roadbeds.

Torans *v.* Ry., 4 S. E., 341.

Hullihan *v.* Ry. Co., 31 Am. & Eng. Ry. Cases, 326.

Vantrain *v.* Ry., 8 Mo. App., 540.

Lewis *v.* Ry. Co., 21 Am. Rep., 389.

Gibson *v.* Ry. Co., 46 Mo., 163.

Chicago Elec., etc., Ry. Co. *v.* Sweet, 45 Ill., 197.

III.

The third division of appellant's brief is devoted to the first of the two seventh assignments of error where the court uses this language: "Now as a general rule where the tracks are in a large railroad yard, where there is a great deal of traffic going on, and where a great many employees walk to

having done so, it imposed the duty on the defendant of making the place absolutely safe, instead of reasonably safe, as the law only requires. Undoubtedly the criticism, technically speaking, is correct; but is this technical inaccuracy misleading? Does it affect the substantial merits of the case?

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and fro crossing the track, a company is required to use more diligence and keep the track in better condition than it would out in the country where no one ever passes over them." We submit that this is not only good law but common sense.

Mr. Justice Brewer, in the very late case of Patton *v.* T. P. Ry., 179 U. S., 658, says:

"He (the master) is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet in all cases it is a question of reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery."

Railroad companies, owing to the dangerous character of the business they engage in, are held to greater care in the operation of their machinery and machines, especially in running through towns.

L. R. & Ft. S. Ry. Co. *v.* Barker, 33 Ark., 373.

Brown *v.* Ry., 50 Mo., 465.

Indianapolis *v.* Ry., 131 Ind., 82.

Galveston, etc., Ry. *v.* Matula, 79 Tex., 577.

IV.

We submit that there is nothing in this branch of appellant's argument—and they do not seem to have made any effort to comply with the rules of the court in urging it. They do not even tell us where the words complained of are to be found.

V.

There was evidence that it was plaintiff's duty to get on the front of the engine. Wesley Graves says it was the

customary and proper place for the head brakeman to ride (Rec., p. 43). Plaintiff says: "I have got days for not being on the front end of the engine coming into a yard" (Rec., p. 47). Hilliard Graves says: "It was customary for the head brakeman to jump on the step on the pilot and ride into the yards." "Yes, sir; we always thought that was our duty" (Rec., p. 79). We submit that the court's charge was full and explicit and left the question of contributory negligence to the jury.

VI.

Apellant urges that the court erred in permitting the witness to testify as set out in the ninth, eleventh and thirteenth specifications of error. The authorities cited by counsel do not bear out their contention. They seem to have misconceived both the questions and answers of the witness. The witness was not asked whether the defendant made any changes or repairs after the accident. But in each case they were simply asked whether they knew the condition of the step just before or just after the accident. It was certainly competent to prove the condition of the step just before or just after the accident as reflecting light upon the condition of the step at the time of the accident. Defendant proved by several of the witnesses the condition of this step just before and just after the accident. The testimony introduced by the plaintiff upon this point was certainly competent if for no other reason to contradict the evidence of the defendant. But as these assignments are not urged with any show of earnestness by counsel, we think it hardly worth our while to waste any time upon them.

VII.

Whether the tracks in the North Little Rock yards were properly constructed and ballasted was for the jury, and expert testimony was not admissible. Tennessee's evidence was entitled to as much weight as McAvoy's.

Rodgers, Expert Testimony, p. 13.
Lawson, Expert Testimony, p. 94.
Ib., pp. 497, 520.

APPELLANT'S AUTHORITIES.

The case of Patton *v.* T. P. Ry. Co., 61 Fed., 259, 95 F., 244, and 21 Sup. Court Rep., 275, was decided by a divided court with an able dissenting opinion by Judge Toulmin. The majority of the court placed their opinion on the ground that there was *no* evidence to show negligence on the part of the railroad company; that the plaintiff himself had aided in securing the step two days before and there was nothing to show that it had been tampered with; that plaintiff and others had used it repeatedly just prior to the accident and had full and explicit knowledge of its condition; that the railroad showed continuous and frequent inspection and exhibited the greatest of care in the premises. The railroad in that case made a much stronger defense than in the case at bar.

In Cunningham *v.* Chicago, Milwaukee and Saint Paul Railway Co., 17 Fed. Rep., 49, 882, the plaintiff was standing in the middle of the track; the engine was backing towards him; "it is in proof that the defect in the footboard had nothing whatever to do with, and in no way contributed

to the accident of the deceased, for the reason that where he stepped or attempted to step, the footboard was unbroken." (p. 884). Stress is laid upon the fact that he got on *behind* instead of on the *side;* that he "did this of his own prompting and not because anybody told him to do it."

Even in this case the testimony appeared so conflicting and doubtful to the trial judge that he allowed it to go to the jury and then set it aside contrary to the general practice of Federal courts.

Chicago Elec. Ry. Co. *v.* Davis, 53 Fed., 61, the plaintiff deliberately let go his hold on the hand car and "went down upon the roadbed; he did not call out, or reach out to grasp anything or anyone, nor did he lose his balance or fall, but stood still as if he had stepped down, or walked a step or two towards the dump car" and was run over. In other words, he got on the track, where he had no business, without any object in view, and deliberately stood where he had no business and permitted himself to be run down; "unnecessarily exposed himself to a perfectly obvious danger." This is certainly a very different case from the one at bar.

Baker *v.* Barber Asphalt Paving Co., 92 Fed., 119, was where a driver was injured by a team running under a beam over the gate. There the driver was well acquainted with the facts; had driven under this beam for years; knew the difficulty and danger attending the business. The trial court directed a verdict for the defendant.

In Morris *v.* Duluth S. S. & A. R. R. Co., 108 Fed., 747, the plaintiff stubbed his toe on a blocking rightfully there and properly constructed. Secondly, he stepped in between

the two cars in the dark, while they were moving about four miles an hour, undertook to pull the pin with his hand, neglecting the lever placed there by the company for that purpose. The court (Sanborn, Judge) held that the defendant was guilty of no negligence and affirmed the lower court in taking the case from the jury.

Detroit Crude Oil Co. *v.* Grable, 94 Fed., 73, the defectively constructed machinery was the same as when plaintiff entered the service fourteen months previous. The court held that the defects and conditions complained of were obvious and known to the servant when he entered into the service and were constantly before his notice for fourteen months, while in the discharge of his regular duties; that he was a skilled, experienced engineer, with opportunities to observe and understand the danger superior to those of the master, and under the state of facts he assumed the risks incident thereto.

In the case of Finnell *v.* Delaware, etc., Railroad, 129 New York, 669, the court lays stress upon the fact that the plaintiff was an experienced brakeman; that he was acquainted with the locality where the accident happened; that it was a branch track not constructed for the purpose of running trains of cars upon, but for the purpose of storing cars; that it was not ballasted like the main track at the place of the accident; that the condition of the track was perfectly visible; that the accident occurred in broad daylight; that the engine had been backing several hundred feet where the condition of the track was plainly visible to the plaintiff.

These are different from the facts in the case at bar.

In Penn. Co. *v.* Hankey, 93 Ill., 580, cited by the New York case and set out in full in plaintiff's brief (p. 79), the place complained of and not ballasted "was built and used as a place for the temporary storing of cars; it was about two miles long; the main line and the part of this track south where it joined the main line at or near the switch, were ballasted and smooth;" this disaster occurred in broad daylight and after plaintiff had just walked over the same track, and knew it was not ballasted; plaintiff was a witness and did not undertake to say that he did not observe that this track was without ballast; plaintiff also had a duty of coupling to perform which would take some time and was different from merely jumping on a pilot where his attention was not diverted or divided.

In Andrews *v.* Ry. Co., 12 So., 432, the trial court directed a verdict for the defendant, holding that for a brakeman to jump on the pilot of a moving train and to walk in front with his back to the engine was negligence *per se*. The supreme court affirmed the city court.

These are the principal cases relied upon by appellant. We do not attempt to review all the cases cited. But we feel no hesitancy in saying that appellant has cited no case where either the trial or appellate court has ruled, as a matter of law, that acts similar to plaintiff's and under like circumstances, were negligence *per se*.

VIII to XVI of plaintiff's brief contains no point that requires the attention of the court under the rules as construed in

City of Lincoln *v.* Sun-Vapor Street Light Co., 59 Fed., 756.

The court of appeals held that whatever error there may have been in the charge of the court complained of by counsel was cured by other parts of the charge. Without going fully into the instruction of the court we call attention to the court to the following parts which we think gave the correct exposition of the law of the case.

The court instructed the jury properly in the following places:

As to the question of the footboard, just following the first excepted charge, the court says: "You are therefore to determine from the evidence the first question raised by the plaintiff, whether the step or plate in front of the engine and attached to the pilot, on which the plaintiff tried to step, at the time of the accident was *by reason of defendant's negligence* insecurely fastened," etc. (Rec., p. 101).

Again (Rec., p. 102), the court said: "Now, as to the duty of providing reasonable and safe places for the servants to work, the court instructs you that when a place is in such a condition as similar places under like conditions are usually kept by well managed railroad corporations, then the company has fully discharged its duty towards its employees, and is not liable for injuries sustained by its servants," etc. While this charge was dealing with the question of the track it is broad enough to cover all involved, and again, lower down, speaking of the track, the court says: "Now in this case, gentlemen of the jury, it is left to your judgment to determine whether the railroad company is

guilty of negligence in allowing at that time and that place a track to remain with spaces between the cross-ties unfilled whereby its servants or employees might get their foot caught and perhaps get injured."

Again (Rec., p. 103): "It is for you to determine, after giving due weight to all the testimony, whether you think, in view of the fact, that this yard was only completed in December, it was the duty of the railroad company by the exercise of ordinary diligence—not extraordinary, but ordinary diligence to fill up its track—the spaces between the cross-ties before the time when this accident occurred on the night of February 5; or whether it was exercising ordinary diligence by allowing the track to remain in the condition it was in, in order that they might settle the roadbed and the yards be drained."

As to the condition of the track, the first paragraph on Rec., p. 106 again emphasizes the duty of the company simply to exercising ordinary diligence.

On Rec., page 108, after the court had repeated the charge alleged to be error on page 100, it qualifies it by the following explanatory sentence: "Now, if this plate was properly fastened when the train left and it had been inspected, and you find from the evidence that it was inspected at proper and suitable times by the defendant and was found to be in perfect condition, then if within a short time before the accident occurred after it left some central place * * * or a short time before it reached here something unknown to any person caused it to become loose, then, gentlemen of the jury, they would not be guilty of

negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order."

This charge more elaborate and lengthy than the other, specifically called the attention of the jury to the fact that the question was one of negligence and pointed out the specific things that would or would not constitute negligence, adding, " If you find that it has exercised due diligence, such as any ordinary reasonable man would exercise in matters of that kind," then it would not be liable.

And again, " On the other hand, if they had not" (that is, exercised due diligence), " and it was loose, or if it was loose at such a time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable." And again following this: " Of course, so far as the railroad company is concerned it does not in any event become the insurer of its servants' or employees' safety regardless of his own diligence. All it undertakes to do is to keep the machinery and its right of way and places where they work, in good and proper order and use such diligence as a prudent and careful man would use."

The rule of this and other courts is so well settled that it is hardly necessary to cite authorities to show that a case will not be reversed for mere verbal criticisms, ambiguities, omissions of qualifying words, or where sentences, propositions or disjunctive phrases taken by themselves do not

state the law, especially when the law of the case is covered by other parts of the charge. Upon this point we cite the following cases:

In Ry. *v.* Whitton, 13 Wall, the court, at page 290, says:

"But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law which they represent, if the law arising upon the evidence is given by the court with such fullness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence."

In Baltimore & Potomac Ry. *v.* Mackey, 157 U. S., at page 84, an instruction as follows was given:

"The jury are instructed that the employees of a railroad corporation have a right to expect that the corporation will, as far as possible, provide for their protection in moving its trains sufficient machinery in good order and condition, and that it will exercise reasonable care and caution not to use cars in its trains having defective brakes; * * * "

And the court in that connection at page 86 said:

"The next objection urged by the defendant, in support of its second assignment of error, is that the words 'as far as possible,' in the first of the above instructions, imposed upon the railroad company a higher degree of care in selecting and keeping in order its appliances and machinery than the law requires. It may be observed that the objection to the instruction containing the particular words complained of was general in its nature. The instruction embodied some propositions of law to which no objection could be properly made, and it was the duty of the defendant to point out, specifically, the part of the instruction which it regarded as announcing an erroneous principle of law. But we need not put our decision entirely upon this ground;

for it is clear that the jury could not have been misled by the use of the words 'as far as possible.' The instruction in which these words are found distinctly informed the jury that the law imposed upon the company the duty of execising 'reasonable care and caution.' And in its charge to the jury the court said: 'Was that brake in proper reasonable condition? If it was not in a proper, reasonable condition, did the cars roll back in consequence of that infirmity? Was the accident traceable to that? I will say here, gentlemen, that if you should be satisfied, from the evidence in this case, that this brake was in a reasonably good condition, in good ordinary repair, and there was nothing wrong about it, then the plaintiff cannot recover, because that would end the case.' Again: 'So, you see, gentlemen of the jury, the only question, so far as the negligence of the defendant is concerned, is, was the brake defective, out of order, not in reasonable repair, not reasonable for the occasion, and if not, was such fact the cause of the accident, or did it materially or directly contribute to it?' Taking the instructions and the entire charge of the court together, it is manifest that the jury understood the words 'as far as possible'—if they thought at all of mere words— to mean 'as far as possible,' *exercising reasonable care and caution.*"

In Rogers *v.* The Marshal, 1 Wall., 644, 654, Mr. Justice Davis, speaking for the court, well observed that "a nice criticism of words will not be indulged when the meaning of the instruction is plain and obvious, and cannot mislead the jury."

And in Evanston *v.* Gunn, 99 U. S., 660, 668, Mr. Justice Strong said: "Sentences may, it is true, be extracted from the charge which, if read apart from their connection, need qualification. But the qualifications were given in the context, and the jury could not possibly have been misled." And so in Tweed's case, 16 Wall., 504, 516: "Courts are not inclined to grant a new trial merely on account of ambiguity in the charge of the court to the jury, while it appears that the complaining party made no effort at the trial to have the point explained."

See also The Sybil, 4 Wheat., 98.

In State *v.* Levelle, 27 Am. St. Rep., at page 809, the court said:

"Under this ground the appellant's counsel further objects to the definition of malice as given by the circuit judge, because it omits the word 'intentionally,' and claims that a correct definition should read: ' 'Malice means the doing of an unlawful act intentionally, without justification or excuse.' Perhaps this criticism might be well founded if we confined our attention solely to the particular sentence upon which it is based; but when the whole charge is considered together, as the rule requires it to be, there is plainly no foundation for the exception. From what we can discover as to the nature of the case in which this charge was made, as well from the record as the argument here, it does not seem to us that the omission of this qualifying word in defining the word 'malice' could possibly have prejudiced the prisoner."

In Ry. *v.* Hill, 30 Am. St. Rep., at page 72, the court said:

"It is the settled doctrine of this court 'that the general charge given *ex mero motu* in the court below should be read and construed with regard to the connection between its several sentences and propositions, each declaration being shaded and interpreted in the light of its context; and if any part, when so considered, limited, or expanded, asserts the law correctly, it will not furnish ground for reversal, however faulty the particular clause might be if its meaning was not controlled by prior or subsequent passages."

In Ry. *v.* Watson, 5 Am. St. Rep., at pages 579-80, the court said:

"The fourth instruction given by the court reads thus: 'The general rule is, that when a servant, before he enters the service, knows it to be hazardous, or voluntarily continues his service, without objection or complaint, when he has such knowledge, he is presumed to contract with reference to the state of things as they are known to him, and if he knows that the continuance of such service exposes him to constant and certain danger, the servant in such cases takes the risks upon himself, and in case he suffers injury thereby, he waives all claims for damages against his master for such injury. As has been said in argument, the master is not required to take better care of his servant than he takes of himself.' "

Appellant's counsel dissects this instruction, and seizing on the words "without objection or complaint," assails it as erroneous.

This course cannot be successfully pursued. The instruction must be taken in connection with the others of the series, and cannot be considered as standing alone. An instruction is not to be judged by taking some fragments dislocated from their proper connections, nor is one instruction to be taken as complete in itself. This instruction must, as is well settled, be taken as an entirety, and in connection with the others referring to the same subject and immediately connected with it.

The following note from 99 Am. Dec., on page 130, states the proposition correctly, to-wit:

"All the instructions given by the trial court, both in civil and criminal cases, must be construed together; and if, when thus construed, the law be correctly expounded, the judgment will not be reversed because a single instruction, taken by itself, is too broad in its terms, or otherwise erroneous."

See also in Mask *v.* State, 36 Miss., p. 91.
Hemingway *v.* Railway, 7 Am. St. Rep., 829.
Tagg *v.* McGeorge, 35 Am. St. Rep., 891.

OPINION OF THE COURT OF APPEALS.

We submit that the opinion of the court of appeals is amply supported by the testimony. In fact with the verdict of the jury and the unanimous opinion of that court that there was sufficient evidence to support the verdict, it is no longer an open question here. Even the dissenting opinion does not deny that there was evidence to support the verdict

of the jury. The statement of facts set out in the opinion of the court of appeals is abundantly supported both by the letter and substance of the testimony, notwithstanding the comment of counsel in their brief on isolated excerpts from the evidence and the opinion.

Plaintiff Tennessee testified that it was not only the custom of defendant's road but of other roads to ride in on this step; that it was part of his duty and he had never been told not to do so. (Printed Record of this Court, page 39.)

Counsel again say "there is no evidence whatever in the record that plaintiff had ever been commanded by a single conductor to ride on the front end of an engine."

Now we refer the court to the record page 43 of Tennessee's evidence:

"Q. Then what you said, you were just stating what the rules were on other roads?

A. What I said was riding on the front end of an engine. That's Choctaw rules.

Q. Do you say the Choctaw rules require them to ride on the front end of the engine?

A. Yes, sir; that's the instructions from the conductors."

The record fairly bristles with the fact that brakemen were allowed to ride on the front step in the discharge of their duty; that if not peremptorily ordered by the conductors to do so no remonstrance was made; that if there was any rule against it, it was habitually violated by the company and hence not binding.

THE DISSENTING OPINION.

Judge Sanborn, in his dissenting opinion, selects three paragraphs from different parts of the charge which he states was an erroneous declaration of the law of master and servant. The last two of these were not even excepted to by the counsel of the railroad, and neither were assigned as error. The charge of the trial court was given orally, and by consent, each party was to save all exceptions to the instruction given by the court. After the charge was written out defendant only saved exceptions to the first of these three alleged errors and only assigned the first as error. (See Printed Record, pp. 100, 101, and 108.)

These declarations could not have misled the jury if they were not of sufficient importance for learned counsel, under this blanket provision, to have saved exceptions.

Plaintiff in error made no effort to furnish the court a more correct statement of the law of master and servant, unless it is in instruction No. 1 offered by it. But we submit that this instruction No. 1 contains the same vice that it complains of in this part of the court's charge, unless the latter qualifying clauses correct the same. It starts out by saying, "the presumption is that the railroad company has done its duty by furnishing safe and suitable appliances for the performance of its work." It does not attempt to qualify it in words, at least by saying that the master is required to exercise reasonable and ordinary diligence in that behalf. We submit that this alone should estop the plaintiff in error as to this branch of the court's charge. (Rec., p. 109.)

The other objection urged by the learned dissenting judge was to the word "considerable," in which the lower court stated: "If he was careless himself or if the want of attention to his own safety contributed in any considerable degree to his injury, the railroad company is not liable." If this was error at all the reasoning of the majority of the court clearly shows that it was harmless. Webster defines this word primarily to mean "worthy of consideration, required to be observed, borne in mind, or attended to." **Now we submit that there is no difference between this charge and if the court had instructed if it contributed in any degree. What he evidently meant was if his negligence** was such as to be observed or attended to, or borne in mind then it was of such a degree as would bar the defendant from recovery.

But whatever vice was contained in this part of the charge, was cured by the court telling the jury in its various parts what particular acts would be such contributory negligence as would bar a recovery.

Without attempting to cite all of the charge that bore upon this point we call attention of the court to the following paragraphs:

"The first is whether you find from the evidence that this plaintiff was in the discharge of his proper duties when he was trying to get on this plate.

"If under the rules either as communicated to him or as he should have known them by the exercise of due diligence, he was not permitted to get on there, yet in violation

of those rules he did step on there, then it is his own fault that this accident occurred by reason of the step's giving away and he cannot recover.

" But not only that, if the step was of such a nature that a reasonably prudent man, a man who has eyes to see and common sense to judge how to act, could see that it was dangerous to step on so narrow a plate, whether properly fastened or not, while the train was in motion at the rate of speed it was going at the time of this accident, if he could see that there was great danger connected with it, and yet he saw proper to take the chances of getting on it, then, gentlemen of the jury, the law says that it is a risk that he either assumes or otherwise he could have refused, and having assumed the risk and it turns out that he was hurt by having done so, then he cannot recover. (Rec., p. 101.)

" Provided also that the plaintiff, at the time of the accident, did not know, or by . the exercise of (reasonable) diligence could not have known, the condition of the track; but if he knew the condition of the track or could have known it by the exercise of reasonable diligence and yet undertook to perform his work on a track that was dangerous, then the law says he cannot recover. (Rec., p. 102.)

" Now, the knowledge on the part of the plaintiff of the condition of the tracks as well as of the machinery is very important, for if an employee has full knowledge of the dangerous condition of the place where he has to perform work, that is, where the danger is apparent, not some secret danger which he may not ascertain by examining it, that is

not the kind of danger I allude to, but where it is patent so that a man can see it where he has eyes to see and common sense to judge, he assumes that risk.

" Now, if he sees that the place is dangerous, and that if he should step between the ties he might not be able to extricate his foot, and yet with a full knowledge of that fact performs his work on that track, walks up the track, meets the train, and tries to jump on a moving train, if he does that with a full knowledge of all these facts, then, gentlemen of the jury, if an accident occurred the company would not be liable to him, regardless of the fact whether there was any negligence or not in not having filled it up, for the servant has a right to refuse to engage in any business which he sees is more dangerous than he wants to engage in. But if he does engage in it, having a full knowledge of the facts, then he must do so at his peril.

" Now, gentlemen of the jury, it is for you to determine whether this plaintiff at that time knew of the condition of the track or the step as the evidence shows it was in, or not."

" If he did not know it and was in the discharge of his proper duty, then he would be entitled to recover, if the accident resulted without any fault or contributory negligence on his part.

" But, on the other hand, if he knew the condition of the track, although he was in the discharge of his proper duty, he could not recover, or if he was in the proper discharge of his duty but attempted to step on at a place where he had no business to get on, or where he knew it was dangerous to get on, or if he got on at a place where the rules or his own

experience told him he should not get on and when there was other provisions and better provisions made for a man to get on a train while it was moving, then, gentlemen of the jury, he cannot recover.

"An employee cannot recklessly and unnecessarily expose himself to danger and then recover for an injury to which such exposure contributed.

"But, on the other hand, if he had no business to get on that plate but his duty was to jump on the back step, or the step back of the engine, which was wider and more suitable for a man to jump on, then it is immaterial whether the plate in front was securely fastened or not, if that was the proximate cause of the injury he received, he cannot recover.

"If he got on properly there in front and afterwards fell by reason of the fact that the ties were not filled, if he knew that the ties had not been properly filled, or if you find that under the conditions then existing the company was not guilty of negligence, but had exercised ordinary diligence in allowing the track to remain in the condition it was owing to the fact it was a new track, then the plaintiff cannot recover." (Rec., pp. 104, 105 and 106.)

By reason of this corporation being formed under an act of Congress "it was born in the purple," and hence has the privilege of taking this plaintiff from the lowest to the highest court in the land.

We submit that the law has been correctly and liberally given in favor of the plaintiff in error; that evidence shows liability to plaintiff, and that the judgments of the lower courts should be affirmed.

Respectfully submitted,

J. W. HOUSE,

J. E. WILLIAMS,

J. W. BLACKWOOD,

Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 67.—October Term, 1903.

The Choctaw, Oklahoma and Gulf Railroad Company, Plaintiff in Error, vs. Thomas Tennessee. } In error to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 30, 1903.]

The defendant in error commenced this action against the railroad company, plaintiff in error, in the Pulaski Circuit Court in the State of Arkansas, to recover damages for personal injuries sustained by him by reason of the alleged negligence of the company. He alleged in his complaint that on February 6, 1900, while engaged as head brakeman on a freight train of the defendant company, and while in the discharge of his duty as such, in the town of Argenta, near Little Rock, Arkansas, he attempted to jump upon the pilot of the engine of the train of which he was head brakeman, at a time when the engine was proceeding very slowly (about four miles an hour) in the freight yards. That in attempting to jump upon the pilot he stepped on an iron stirrup or step on the pilot or "cow-catcher" of the engine, and where in the performance of his duty he was accustomed to step, and by reason of its being in a weak and unstable condition it gave way and precipitated him to the ground, where he became entangled in the ties of the railroad track and the train ran over his left leg and bruised and mangled the same so that he was compelled to have it amputated near the knee. He alleged that the defendant was negligent in the construction of the step and was negligent in permitting it to stay in a faulty and infirm condition, and the condition of the step was unknown to the plaintiff; that he might have escaped uninjured but for the negligent construction of the track, the ties of which stood up above the ground, so that he was unable to get his foot out in time to prevent the engine from running over his leg and crushing it.

The defendant is a corporation organized and incorporated under an act of Congress, and on that ground removed the case into the United States District Court in Arkansas, and thereafter served its answer to the complaint. It denied all negligence, and alleged that the plaintiff was attempting to step upon the front end of the engine, which was unnecessary and which was careless and improper on his part, and that he was not required in the discharge of his duty, nor was it necessary for him to attempt to so ride, and in attempting to do so he was violating the rules of

the company. It denied that the step on the pilot was in a weak and unstable condition or that it gave way and thereby precipitated the plaintiff to the ground, and denied that the condition of the step had anything to do with the precipitation of the plaintiff to the ground, which resulted in his injury, and it denied that the condition of the step was unknown to the plaintiff.

Upon these issues the case came to trial and resulted in a verdict for the plaintiff, which, upon appeal to the Circuit Court of Appeals, was affirmed, (116 Fed. Rep. 23,) and the railroad company then sued out this writ of error.

Mr. Justice PECKHAM, after making the foregoing statement of facts, delivered the opinion of the Court.

This is quite a simple case, although counsel on both sides have exhibited very great industry in presenting in their briefs in the greatest detail the substance of all the evidence that was given upon the trial.

After the evidence was in a motion was made on the part of the defendant company that the jury should be instructed to find a verdict for the defendant, for the reason that there was not sufficient evidence to sustain a verdict for the plaintiff. The denial of this motion brings up the question whether there was sufficient evidence upon which to base a recovery, and it is upon that question that the briefs of counsel have been so full. It is wholly unnecessary to follow counsel in their minute details of this evidence. It is sufficient for us to say that it tended to show the following among other facts:

He was the head brakeman of the train, and as such his particular position, when running into freight yards like the one at Argenta, was on the front of the engine to enable him to attend to the switches promptly, as they were encountered, and to prevent the danger of running off the track; that the only rule of the company which was promulgated and which he ever saw in regard to the matter of riding on the pilot of the engine was one warning the employes not to jump on or off an engine when it was running at a "high rate of speed." The plaintiff said that he had never received instructions not to ride on the front end of the engine, but on the contrary had often been commanded by conductors to do so; that on the occasion of the accident the engine was moving very slowly, not more than four miles an hour, and that when the plaintiff attempted to board the pilot of the engine and received the injury complained of he was discharging his duty in the proper and customary manner of a head brakeman under like circumstances.

The accident occurred about ten o'clock on a dark night, and the plaintiff carried a lantern to enable him to see to properly discharge his duties

in regard to switches; the pilots of freight engines are provided with a step or stirrup on which to place the foot, and where it is customary for the head brakeman to stand when coming into the freight yard under the circumstances detailed, and the engine in question had such a step or stirrup. When the plaintiff attempted on this occasion, after having attended to one of the switches, to get on the engine, then moving about four miles an hour, he placed his foot on the step mentioned, and it gave way or went down under him, and his foot came to the ground under one of the ties, the space between the ties not being filled in, and he was unable to get it out in time to prevent being run over. This step or stirrup had been in a defective condition for some time, and it was so loose three or four days prior to the accident that a witness and employe of the defendant had at that time warned a fellow brakeman not to step on it because of the condition it was then in. The plaintiff had no knowledge that the step was out of repair or defective before the accident occurred. This freight yard where the accident occurred had been constructed a few months before and the company had but just commenced to use it in which to park and make up its trains; that the plaintiff, on account of some physical disability keeping him off the road for a short period before the accident, had run into this yard only once or twice before the accident occurred, and was not very familiar with its condition at the time in question. He had never been on track No. 3, where he was hurt, until the evening of the accident, and he had no information concerning the condition of that track prior to being injured. The plaintiff testified—

"When I stepped on the engine, this step was on the pilot about as wide as my hand. I stepped up on it with the hollow of my foot and leaned over to catch hold of the top of the pilot and my foot went down with the step, and I hallooed as soon as it went down and fell, and I couldn't get my foot out and the pilot run over my leg. My leg got in between the ties and I pulled with all my might to get it out, but I seen I couldn't get it out and just give up and let it go. My foot got hung between the ties, between the bottom of the ties, and held it fast. . . . I hallooed as loud as I could to make the engineer hear me, but he didn't see me. He must have felt that the wheel of the engine hit something because he stopped the engine right where the engineer gets up into the engine. The step of the engine stopped right at me. I hallooed as loud as I could. When I got my foot caught in there the train ran over me and mashed my leg—mashed it all to pieces; broke the bone, mashed my knee cap all to pieces. I suffered just as near death as any man could suffer and not die. It wouldn't have been as hard to die."

Plaintiff testified that he thought that if the track had been filled in his foot would not have been caught and that he could have extricated himself when the stirrup on the pilot gave way. Other evidence was given on the part of plaintiff of the same general nature.

On the other hand, the defendant gave evidence tending to show that although it was customary to surface up the tracks in depot yards by filling in between the the ties, yet as this was a new yard it was in the condition in which newly constructed yards are usually left for some time to permit the water to drain off. Evidence was also given tending to show the impropriety of the plaintiff's attempting to get on the engine while it was in motion and that it was a violation of the rules of the company.

Taking all the evidence we are of opinion that there was enough to demand its submission to the jury, and if by that body found to be true, it was enough upon which to found a verdict for the plaintiff.

The chief ground upon which the demand for a new trial is founded outside of the above rests upon certain portions of the charge of the court to the jury in speaking of the law relating to the responsibility of an employer to his servant to furnish proper machinery and appliances for his employe. In two or three places, in the course of his charge to the jury upon that subject, the court, in speaking of the testimony in regard to the facts occurring at the time of the accident, said that the company owed to its employes the duty of furnishing machinery in a reasonably safe condition and a reasonably safe place for the servant to work in the discharge of his duties, and a failure to do so makes the company liable in damages for any injuries sustained by the servant while in the discharge of his duties, if the servant's own acts of negligence do not contribute to the accident.

The fault found with this observation is that the court should have added that the company did not absolutely guarantee to furnish its employes a reasonably safe place to work and reasonably safe machinery with which to discharge their duties, but that it fulfilled its obligations if it observed reasonable care to furnish its employes those reasonably safe places to work, &c.

It need not be questioned that the charge of the court, without the limitation proposed, was an erroneous exposition of the law. (*Hough* v. *Railway Co.*, 100 U. S. 213; *Union Pacific Railway Co.* v. *O'Brien*, 161 U. S. 451, 457, and cases cited.) A careful reading of the charge, however, shows that upon the particular occasions when these remarks were made the judge was endeavoring to draw the attention of the jury more to the question whether the defendant had in fact furnished machinery in a reasonably safe condition than to the question of its obligation to use due diligence to furnish the same.

An exception was taken to but one of the remarks of the court upon this particular subject, and if the defendant had felt that there was really any danger of any misunderstanding of the rule which should govern the jury, a request to the court to restate the rule, with his attention specially called to the defective portion of the charge, would without doubt have

received the immediate attention of the court and obtained a charge upon the subject as requested. We say that, because in looking through this charge it is perfectly plain that the court understood the true rule that it was necessary to show that the company had been negligent in not taking reasonable precautions to furnish proper machinery and appliances in order to become liable for the injury sustained by the employe. The jury were told by the court that, in order to find the defendant liable, it must determine from the evidence whether the step or plate in front of the engine and attached to the pilot, and which plaintiff tried to step on at the time of the accident, was by reason of the defendant's negligence insecurely fastened, and that by reason of its being insecurely fastened the plaintiff fell and was injured as alleged.

The court also charged the jury that, unless it was shown by the evidence that the employer or master was guilty of negligence in its failure to provide such a safe place for the servant to perform his duties, as under like conditions others in similar businesses are in the habit of furnishing, the defendant would not be liable. He further said that it was left to the judgment of the jury to determine from the evidence whether the railroad company was guilty of negligence in allowing at that time and place the track to remain with the spaces between the cross ties unfilled, and that they were to consider the fact that this yard had but recently been made, and that was a pertinent fact in relation to the question of the negligence of the company.

Again, the court at almost the end of his charge stated that if this plate had been properly fastened when the train left for its destination, and had been inspected at a proper and suitable time by the defendant, and was found to be in perfect condition, and that within a short time before the accident occured something unknown or unforeseen had caused it to become loose, "Then, gentlemen of the jury, they would not be guilty of negligence, because then they would have exercised due diligence for the purpose of ascertaining whether everything was in perfect order."

And once more the court said:

"Now then, that you are to consider:

"If you find that it has exercised due diligence, such as any ordinary reasonable man would exercise in matters of that kind, then it would not be liable.

"But, on the other hand, if they had not, and it was loose, or if it was loose at such time that by the exercise of reasonable or ordinary diligence they could have discovered it and repaired it, and that was the cause of the accident, they have been guilty of such negligence as makes them liable.

"Of course, so far as the railroad company is concerned, it does not, in any event, become the insurer of its servants' or employes' safety, regardless of its own diligence: all it undertakes to do is to keep the machinery and

its right of way and place where they work in good and proper order, and use such diligence as a prudent man and careful man would use. And the company is not liable for any defect of which an employe has knowledge at the time."

These observations were at the very conclusion of the charge.

We think it clearly appears that the right directions were given to the jury in regard to the legal responsibility of the defendant, and that the detached and incidental remarks made in regard to such liability, where they failed to state the proper limitation of liability, were used under such circumstances as to make it absolutely certain that the jury were not misled thereby.

Many exceptions were taken in regard to the admissibility of evidence during the trial of the cause and to the refusal of the court to charge as requested by the defendant. We have examined them all and are entirely satisfied that no error was committed by the court in the disposition it made of them. Many of the requests to charge were covered by the charge of the court actually given, and many others were but partially correct and so mingled with erroneous statements of the law as to warrant the court in rejecting them.

The judgment of the Circuit Court of Appeals for the Eighth Circuit must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.